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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936

No. 724

A. A. CARMICHAEL, As Attorney General of the State of Alabama, JACOB L. KAUFMAN, As Chairman and Member, and LUCIEN C. BROWN and JAMES A. LIPSCOMB, As Associate Members of the Unemployment Compensation Commission of the State of Alabama,
Appellants,

vs.

SOUTHERN COAL AND COKE COMPANY, A Corporation,
Appellee.

BRIEF AND ARGUMENT
OF
BORDEN BURR, NIEL P. STERNE and MARION RUSHTON, ATTORNEYS FOR THE APPELLEE

BENNERS, BURR, MCKAMY & FORMAN,
KNOX, ACKER, STERNE AND LILES,
RUSHTON, CRENSHAW AND RUSHTON,
Of Counsel.

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A. A. CARMICHAEL, As Attorney General of the State of Alabama, JACOB L. KAUFMAN, As Chairman and Member, and LUCIEN C. BROWN and JAMES A. LIPSCOMB, As Associate Members of the Unemployment Compensation Commission of the State of Alabama,
Appellants,

vs.

SOUTHERN COAL AND COKE COMPANY, A Corporation,
Appellee.

BRIEF AND ARGUMENT OF APPELLEE.

STATEMENT OF THE CASE.

In order to comply with the Rules of the Court it has been necessary for appellee to file its brief in advance of receiving a copy of appellants' brief. On account of this we make a brief statement of facts.

Appellee, in a bill showing diversity of citizenship and requisite jurisdictional amount, sought interlocutory and final decrees forbidding appellants, the appropriate officials of the State of Alabama, enforcing against appellee the provisions of an Act of the Legislature of Alabama desiginated the Alabama Unemployment Compensation State (hereinafter referred to as the state act).

Appellee's bill of complaint asserted the invalidity of the state act for a number of reasons. Repugnancy to both the Constitution of the United States and of the State of Alabama was pointed out.

Since the decision of the Statutory District Court in this case the Supreme Court of Alabama has held the state act in keeping with the Alabama Constitution (thus relieving this Court of the consideration of this question), and it has also *construed the state act as being dependent upon the validity of the Federal Social Security Act*[1] (hereinafter referred to as the federal act), thus imposing upon this Court the necessity of determining the federal question involved in the constitutionality vel non of the federal act.

Appellee's bill of complaint is found on pages 1 to 154 of the Record, and the grounds asserting the invalidity of the state act because violative of the Constitution of the United States, and because of the invalidity of the federal act, are found in Section 11 (R. pp. 7-8) and in Sections 15, 16 and 17 (R. pp. 16-21).

The allegation that appellee will suffer great and irreparable injury for which it has no adequate remedy at law, and no redress or remedy except in a court of equity, and the facts in support of this allegation may be found in Section 18 (R. pp. 21-24) of the bill.

The United States District Judge for the Middle District of Alabama granted a restraining order pending the organization and action of the Statutory Court. (R. pp. 155-156).

Following the setting down of the case for hearing before the statutory court the appellants filed their answer (R. pp. 161-177).

By stipulation of counsel (R. p. 178) the case was

[1]Emphasis ours unless otherwise indicated.

submitted to the Statutory Court (a) on appellee's application for an interlocutory injunction, and (b) for final decree on the bill of complaint as amended, the orders of the District Judge or Court made prior to submission, proof of service and notice, appellants' motion to dismiss, appellants' answer, written affidavits of appellee (R. pp. 182-271) and written affidavits of appellants (R. pp. 271-287).

Findings of fact and conclusions of law were made by the Statutory Court (R. pp. 291-297).

On December 15, 1936, the Statutory Court rendered its final decree (R. pp. 298-299) granting appellee the interlocutory injunction as prayed for and by final decree making the injunction perpetual, and declaring the state act "unconstitutional and void because in conflict with the Fourteenth Amendment of the Constitution of the United States and of Article I, Section 23 of the Constitution of Alabama."

Pursuant to the statutes appellants appealed from the decree of the Statutory Court to the Supreme Court of the United States (R. pp. 300-308).

The factual averments in the bill establishing the right of the appellee to invoke the jurisdiction of this court for the purpose of deciding the controversy which has arisen between it and the defendants under the Constitution of the United States upon the asserted unconstitutionality of the State Act, are admitted by the answer of the appellant. The following facts are either admitted by defendants' answer or established without conflict by the evidence:

1. STATUS OF APPELLEE.

That since prior to 1915 appellee has been continuously engaged in the State of Alabama in the business

of mining and selling coal in various parts of the United States; that appellee and its employees who are subject to the state act are engaged solely in intrastate business; that it has invested a large sum of money in an extensive plant for mining and selling its products in Shelby County, Alabama; that in the conduct of its business appellee has acquired a valuable and substantial good will with customers in the State of Alabama and throughout the United States; that it has employed in its operations approximately three hundred employees.

That appellee pays annually to the State of Alabama the approximate sum of $37,300 for ad valorem and other forms of taxation.

That in accordance with the terms and schedule of exactions imposed by the state act appellee was obligated to pay the Alabama Unemployment Compensation (hereinafter referred to as the Commission) Commission the sum of $33,519.17 at the time of the filing of its bill.

2. STATUS OF OTHER ALABAMA EMPLOYERS.

It sufficiently appears from the evidence that the classification of employers under the state act is arbitrary and discriminatory. The cross section drawn by the evidence indicates that there are employers who, for several years, have operated, and who expect in the future, judging by the experience of the past, to operate, without any of their employees becoming eligible for compensation, employers who have operated and expect to continue to operate continuously throughout the year; employers whose business is of a seasonal nature and whose employees, on account of this fact, will be unemployed for long periods of time during the year; employ-

ers whose experience record shows that they have had no reduction of employment personnel for the past several years, and expect to have none in the future, and employers who have been forced to reduce personnel by reason of the character of their businesses, and who are faced in the future with the probability of such reductions continuing; employers who have reduced wages during the depression and employers who have not made such reductions. The evidence is without dispute that at the time of the enactment of the state act there existed no previous surveys or statistical or actuarial studies from which anything but the wildest guess could have been made in reference either to the amount of unemployment which might be expected in the future, as to the number of employees who might become eligible for benefits, as to the amount of money necessary to pay the probable benefits, or as to the schedule of exactions necessary to be imposed on employers and employees in order to raise the required funds. These and the many other inequalities, discriminations and arbitrary features of both the federal and state acts will be discussed in detail later.

3. STATUS OF APPELLANTS.

That the defendants are officers of the State of Alabama, residing in or having their offices in Montgomery, Alabama, charged by the laws of Alabama with the duty of enforcing and administering the state act, and that defendant Kaufman, as Chairman and Member, and defendants Brown and Lipscomb as Associate Members of the Unemployment Compensation Commission of the State of Alabama (hereinafter referred to as the Commission) are especially charged by the act with the duty of its administration.

That the Commission is actively engaged in administering the state act, has organized itself with numerous employes; has opened and is maintaining offices in different parts of the state; has spent and is continuing to spend large sums of money in publicizing the provisions of the state act and of the federal act, and in attempting to enforce the state act; that acting solely under the authority of the act it demanded of plaintiff and all other employers the payment on or before the 5th day of October, 1936, of the exactions imposed by the act upon employers and employes (the employers being made responsible by the act (Sec. 4 (d)) for collecting from employes and paying to the Commission the exactions imposed upon its employes) and demanded and required and is demanding and requiring the making by the employers and filing with the Commission of various voluminous reports in reference to their employe relationships and other matters affecting their local businesses.

The extent to which the Commission has gone as against the plaintiff is sufficiently proven by copies of papers served by it upon the plaintiff, which are attached to the bill of complaint and marked "Exhibits E, E1 and E2 to E10," both inclusive. (P. 59 to 154.)

4. APPELLANTS' INTENTION AND THREATS TO ENFORCE ALL PROVISIONS AND PENALTIES OF THE ACT AGAINST APPELLEE

The threats and intention of defendants to enforce the act to its fullest extent against appellee and other employers, and to impose upon them all the penalties provided for by the act for default or violation of its provisions or of the orders of the Commission are frankly and fully admitted, the position of the appellants being

that the act is valid in all respects, that it is their duty to enforce, and that they intend to perform this duty.

It is therefore admitted that unless protected by the injunctive process of this court, appellee faces immediately the imposition of the following, among other, provisions and penalties of the act:

(a) The payment of interest at the rate of one per centum per month on all past due payments (Sec. 15, state act).

(b) The imposition of a fine of not less than twenty dollars nor more than two hundred dollars, or imprisonment in the county jail not longer than sixty days, or of both such fine and imprisonment for appellee's willful failure or refusal to make payment of the exactions when and as required by the Commission (Sec. 15 of the act).

(c) The imposition of a fine of not less than twenty dollars nor more than two hundred dollars, or imprisonment in the county jail not longer than sixty days, or of both such fine and imprisonment for appellee's willful failure or refusal to furnish any reports when and as required by the Commission, or to appear or testify or produce records when and as required by the Commission (Sec. 15 of the act).

(d) Each day of such failure or refusal constitutes a separate and distinct offense (Sec. 15 of the act).

(e) Any violation of any provision of the act (the Commission, as we shall hereafter see, has plenary power to extend the operation of the act through rules and regulations) for which the act does not expressly prescribe a penalty is made a misdemeanor punishable by fine of not less than twenty nor more than fifty dollars, or by imprisonment in the county jail not longer than thirty days, or by both such fine and imprisonment (Sec. 15 of the act).

We also assert, and will hereafter demonstrate, that under the interlocking provisions of the federal act and the state act, any payments made by appellee to the Commission are required to be at once sent to and disposited with the Social Security Board (hereinafter referred to as the Board) at Washington, and to remain subject to its entire control, with no provision of any kind made for a refund in the event the act is judicially declared invalid.

Appellants do not seriously deny (if the act is invalid) that appellee is threatened with great and irreparable injury, and that it has no adequate legal remedy for its prevention except through the equity injunctive power of the court.

Part I.

THE ALABAMA UNEMPLOYMENT COMPENSATION ACT IS DEPENDENT UPON THE VALIDITY OF TITLES IX AND III OF THE SOCIAL SECURITY ACT. THESE TITLES BEING UNCONSTITUTIONAL, THE STATE ACT MUST FALL.

Proposition I.

THE CONSTRUCTION BY THE SUPREME COURT OF ALABAMA OF THE ALABAMA UNEMPLOYMENT COMPENSATION ACT INSOFAR AS IT DOES NOT RELATE TO ITS VALIDITY VEL NON UNDER THE CONSTUTITION OF THE UNITED STATES WILL BE FOLLOWED BY THE SUPREME COURT OF THE UNITED STATES.[1]

Proposition II.

THE SUPREME COURT OF ALABAMA HAS SO CONSTRUED THE STATE ACT AS TO HOLD THAT

[1]For supporting authorities and argument see our brief and argument.

BY ITS TERMS IT IS INVALID AND INOPERATIVE IF TITLE IX OR TITLE III OF THE FEDERAL ACT IS UNCONSTITUTIONAL.

Proposition III.

TITLE IX OF THE FEDERAL ACT IS UNCONSTITUTIONAL BECAUSE ITS ENACTMENT WAS BEYOND THE ORBIT OF CONGRESSIONAL POWER.[2]

Proposition IV.

TITLE III OF THE FEDERAL ACT IS UNCONSTITUTIONAL BECAUSE (a) ITS ENACTMENT WAS BEYOND THE ORBIT OF CONGRESSIONAL POWER, and (b) IT IS INSEPARABLE FROM TITLE IX AND MUST FALL WITH IT.[3]

Factual Statement Relating to the Above Stated Propositions.

A.—EFFECT OF THE DECISION OF THE SUPREME COURT OF ALABAMA IN REFERENCE TO INTERPRETATION AND VALIDITY OF THE ALABAMA ACT.

On the 18th day of March, 1937, the Supreme Court of Alabama, in an opinion handed down in six cases, sustained the validity of the state act and held that it was not violative of any provisions of the Constitution of Alabama. IT ALSO HELD THAT THE STATE ACT WAS INOPERATIVE IF THE FEDERAL ACT WAS INVALID UNDER THE CONSTITUTION OF THE UNITED STATES AND THAT IN ITS OPINION THE FEDERAL ACT WAS IN KEEPING WITH THE FEDERAL CONSTITU-

[2]For supporting authorities and argument see our brief and argument.
[3]For supporting authorities and argument see our brief and argument.

TION. OTHERWISE STATED IT DECIDED A FEDERAL QUESTION, A DECISION ON WHICH IT FOUND TO BE NECESSARY IN ORDER TO SUSTAIN THE STATE ACT.

Four of the six cases[2] were suits in equity by Alabama employers, as complainants, seeking to enjoin state officials, as respondents, from collecting the exactions imposed by, and from enforcing the provisions of, the state act as against the complainants.

Two of the cases[3] were suits at law brought by plaintiffs, who were employes of defendants, for the recovery of that portion of their earned wages which had been withheld by the defendants pursuant to Section 4(d) of the state act, which imposes a tax of one per centum on the wages of all employes and makes each employer responsible for withholding such per centum from the wages of his employes, for showing the deduction on his pay roll and records, and for transmitting the same to the Unemployment Compensation Fund.

WE FULLY RECOGNIZE THAT THIS COURT WILL NOT QUESTION THE CORRECTNESS OF THE RULINGS OF THE SUPREME COURT OF ALABAMA INSOFAR AS THEY CONSTRUE STATE STATUTES AND DECIDE AS TO WHETHER SUCH STATUTES ARE VIOLATIVE OF THE ALABAMA CONSTITUTION.

We will, therefore, refrain from discussing the allegations of appellee's bill of complaint (R. pp. 11-16)

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[2]Beeland Wholesale Co. vs. Jacob L. Kaufman, as Chairman, et al, No. 198. (The opinion was rendered in this case, affirmances in the other five cases following.)

Talladega Ice and Storage Co. v. A. A. Carmichael, et al, No. 197. West Point Mfg. Co. vs. A. A. Carmichael, et al, No. 200. Alpha Portland Cement Co. v. A. A. Carmichael, et al, No. 201.

[3]P. O. Adams vs. Dwight Mfg. Co., No. 436.

Hubert Killian vs. Gulf States Steel Company, No. 437.

which assert the invalidity of the state act on account of its violation of Sections 3, 6, 22, 35 and other provisions of the state constitution.

We insist that for the same reasons and authorities which preclude us from asking this court to depart from the Alabama Court's conclusion in reference to the asserted invalidity of the state act because in violation of the provisions of the Alabama Constitution appellants are likewise precluded from asking this court not to adopt and follow the construction by the Alabama Court that the state act is dependent upon the validity of the federal act and must fall if the federal act is unconstitutional.

We regard as of first importance in this case the determination by the Supreme Court of the United States of the validity vel non of Titles IX and III of the federal act, and in order that there can be no misunderstanding that the Supreme Court of Alabama thoroughly agrees with this conviction, we now present that part of the opinion of the Alabama Court which holds without equivocation that the determination of the validity vel non of the federal act is a present sine qua non to the determination of the validity vel non of the state act. To insure a clear and definite understanding of the opinion of the court we first set out the contentions of counsel for both parties before the Alabama Court in reference to their respective constructions in this particular of the state act. Attorneys for the taxpayers in the Alabama cases in their brief said:

> "The state act is inextricably interlocked with and dependent upon the federal act and is not intended to and can not operate without the federal act and it is incapable of administration, application or enforcement unless the federal act be constitutional.
>
> * * * * *

"1. THE ALABAMA ACT CAN NOT EXIST WITHOUT THE FEDERAL ACT.

"The Alabama Act can not stand without the federal act. The heart of the Alabama Act is the levying of an exaction upon pay rolls, the sums of money realized by such exactions to be remitted to a federal agency created by the federal act, invested in a trust fund set up by said act, and subsequently returned by the federal agency to the Alabama Unemployment Compensation Commission for disbursement within certain ranges and upon certain conditions prescribed by the federal act. The Alabama agency can not disburse one dollar of the moneys received by it from the levies on pay rolls. It must immediately upon receipt send this money to the National Social Security Board and can withdraw the money only upon requisitions honored by the federal agency. The Alabama Commission can not use any of the funds collected by it from either employers or employes for the purpose of defraying the expenses of the Commission and the other expenses of administering the Alabama Act. It can only requisition and use these funds for the sole purpose of paying unemployment compensation benefits under a state act bearing the approval of the federal agency. The Alabama Commission can not determine the administrative expenditures to be made by it. All administrative expenditures to be made by the Alabama Commission are determined by the National Security Board. All funds for the administration of the Alabama Act are provided by the federal government out of revenues appropriated by the federal act. The National Social Security Board has powers of life and death over the Alabama Unemployment Compensation Commission, as the National Security Board not only determines the amount of administrative expenditures the Alabama Commission may make but has power to entirely cut off funds for administration at any time it may

determine the Alabama Commission is not properly executing the mandates laid upon it by the federal act. These and other provisions of the federal act are so entwined with the state act that the state act is as incapable of existence without the federal act as the heart is incapable of being severed from the veins and arteries without producing death."

* * * * *

"Section 17 as amended on April 21st 1936 provides that the State Act shall become inoperative if either Title III or Title IX of the Federal Act should be declared unconstitutional by the Supreme Court of the United States, and section 18 as amended on April 21st 1936 provides that the State Act shall cease to be operative if the Federal Social Security Act is declared unconstitutional by the Supreme Court of the United States.

"These two inconsistent amendements were adopted on the same day; however, the legislative journals show that the amendment to section 17 was last enacted, and therefore controls if there is any inconsistency in the two amendments. When the Legislature of Alabama provided that the State Act should be inoperative if the Federal Act be declared unconstitutional by the Supreme Court of the United States, this was but their shorthand way of stating that the State Act could and should be operative only in the event the Federal Act was constitutional. Otherwise stated, if the Federal Act is inflicted with constitutional infirmities, the State Act cannot stand because the Federal Act is the indispensable and integral base of the State Act.

"In the court below, attorneys for appellants contended that sections 18 and 17 of the State Act as amended should be construed as a legislative declaration; that the State Act should continue in operation until the date of a decision by the Supreme Court of the United States declaring the Federal Act or Title III or Title IX thereof unconstitutional. We submit that no such construction can be

given to the provisions of section 18 or section 17 as amended. This provision is not one of limitation. It expressly provides for the return of the *unexpended* portions of the funds invested in the Unemployment Trust Fund. It cannot be distorted into evidencing a legislative intent that the State Act should remain in force and effect until the Supreme Court of the United States decided the Federal Act to be invalid, notwithstanding the fact that the Federal Act is clearly unconstitutional. Such a holding would place Alabama in the senseless position of parting with millions of its citizens' funds with no chance of refund or recovery, and of having on its statute books a law which could not possibly function if the Federal Act is unconstitutional. If the Federal Act is unconstitutional it was invalid *ab initio*. It became invalid before the ink of the President's approval dried. 'An unconstitutional act is not a law; it confers no rights; it creates no office; it is in legal contemplation as inoperative as though it had never been passed * * *' *Extein Norton v. Shelby County, State of Tennessee,* 118 *U. S.* 425.

"If the provisions in question were construed as meaning that not the unconstitutionality of the Federal statute but the act of the Supreme Court should end the life of the State Act, then the legislation would be obnoxious to another well-settled principle of constitutional law. The Legislature of Alabama cannot delegate to any person, persons or governmental department power to determine an Act of the Legislature. The fact that the delegate is so exalted an institution as the Supreme Court of the United States would, of course, in no way derogate from the force of this fixed principle of constitutional law. The validity of the State Act, therefore, being dependent upon the Federal Act by its express terms, it is imperative and indispensable that appellees obtain on this record a declaration of the validity vel non of the Federal Act, otherwise

appellant and other Alabama taxpayers continue to be confronted with the necessity of complying with the State Act for an indefinite period although it is abortive if the Federal Act be, as we insist, invalid."

On the contrary, counsel for the state, in their brief before the Alabama Court, contended that:

"The validity of neither Title III nor Title IX of the Social Security Act is involved in this case - - - the Alabama statute is not dependent upon the validity of either Title III and Title IX of the Social Security Act and that consequently the question of the validity of those titles is not before this court in this case - - - appellants contention that the validity of the State law is dependent upon the validity of the Federal Act is not well taken, certainly there is no declaration of such dependency, nor is there legislative intent to that end - - -."

The brief for the state proceeding, quoted Section 17 as amended by the Act of April 21st, 1936, and said:

"This language is easily understood. It states a single condition that was to determine the State Act, namely, the final adjudication by the Supreme Court of the United States that the Federal law is invalid. Confusion would have been invited to make it dependent upon possibly diverse decisions of other courts. Prior to the happening of the specified event the appellants and others similarly situated are liable for their contributions. The provision for a return of contributions already made makes it clear that the Alabama Act was to continue in operation until that event. Validity of the Federal law is not a condition *precedent* to the operation of the State law. But declaration by the Supreme Court of the invalidity of the Federal law is a condition *subsequent* that renders the act inoper-

ative for the future. It fixes a terminal date of the State law."

Therefore, it is clear that this question as to the construction in this respect of the state act was squarely presented to the Supreme Court of Alabama. It was squarely met and answered in the following portion of the opinion of the Alabama Court:

"But in this instance the Federal Security Act had been enacted by Congress. The Alabama Act ties into it, and forms a part of a nationwide economic scheme provided for by the Federal Act. Unless it is tied up to such a widespread program, it probably could not have the influence on economy which is the foundation for its existence. It would be useless, perhaps, for one state to try to effect economic stability in respect to a situation which knows no state boundaries. But the Act is not dependent upon action by other states, but the validity of an existing Act of Congress. Expressly made to depend upon a decision of the United States Supreme Court upholding that Act, *in reality it is merely dependent upon its constitutionality.* Reference is made to the decision of the United States Supreme Court because that is the only court which has the authority effectually to declare it unconstitutional. Dependence upon its decision in that respect is but dependence upon the effect of that decision. Its effect is that the Federal Act is valid or that it is invalid from the beginning. It never existed if it is declared to be unconstitutional. We see no reason why an Alabama statute may not be made to depend upon the *validity* of an existing act of Congress into which it is tied in a way necessary for it to have an effective field of beneficial operation for the public welfare. Such, we think, the status of the Alabama Act, and it cannot be stricken down on that account.

> "It is *necessary* for us to lay down the law of this suit as we understand it, and since the Alabama Act is *dependent* upon the constitutionality of the Federal Act, *it is necessary* to express our opinion as to that insofar as it affects its unemployment features, since the United States Supreme Court has not acted on it. We do not feel disposed to enter into an extended discussion of the question, because it would serve no useful purpose, but we will mention the various contentions which have been made by counsel, and state our views on them."

We, therefore, conclude this analysis of the decision of the Supreme Court of Alabama in construing the state act in the particular above discussed by asserting:

(a) Under the construction of the Alabama Supreme Court the state act must fall if the federal act is unconstitutional.

(b) This court is obligated to follow this construction of the Alabama Supreme Court in reference to the state act.

(c) Titles IX and III of the federal act are unconstitutional and invalid for reasons hereinafter specified.

In support of these propositions we regard a statement of the purposes of the sponsors of the acts, their legislative history, their interlocking provisions, the federal dominance of the state act as of even greater importance than citation of authorities or supporting argument. We believe that a thorough factual statement in reference to an analysis of the federal and state acts will make easier of application the decisions of this court over a period of many years, in demonstration of the invalidity of the federal act and the fall of the state act with the fall of the federal act.

B.—FACTUAL BASIS OF THE FEDERAL ACT AND OF THE STATE ACT, THEIR REAL PURPOSE AND INTERLOCKING FEATURES.

In determining whether Title IX imposes an excise tax for the support of the government or is an attempt, under the pretext of executing delegated taxing power, to pass laws for the accomplishment of objects beyond the orbit of congressional power, and in determining whether Title III is a part of the same device and also incapable of being upheld under the spending powers of Congress, and in considering the allied questions of federal usurpation and surrender of state sovereignty, the court will consider, on a factual basis:

1.—The purpose of the legislation as evidenced by its legislative history which properly includes the announced purposes of its sponsors, statements in hearings before the committees of Congress, and the deliberations of the legislative bodies;

2.—The legislative history of the State act;

3.—The terms and provisions of the acts, and

4.—The administrative acts of the board and commission entrusted with the administration of the respective acts.

We shall discuss these in the order named:

1.—(A)—MESSAGES OF THE PRESIDENT:

On June 8, 1934, the President first presented to Congress the objectives of contemplated social security legislation and named as the first objective in the task of reconstruction "the security of the men, women and children of the nation," etc., etc. (Cong. Rec. Vol. 78, Pt.

10, p. 10770). In the same message he designated "three great objectives—the security of the home, the security of livelihood, and the security of *social insurance.*" Referring more specifically to unemployment, the President said he believed "that the funds necessary to provide this unemployment and old age insurance should be raised *by contribution rather than by an increase in general taxation.*" (Cong. Rec. Vol. 78, Pt. 10, p. 10771).

Accompanying his message of January 17, 1935, the President submitted to Congress the Report of the Committee on Economic Security which he had created.

In this message the President also said:

> "In the first place the system adopted except for the money necessary to initiate it, *should be self-sustaining in the sense that funds for the payment of insurance benefits should not come from the proceeds of general taxation* * * *.

and he stated that with respect to unemployment insurance he had concluded

> "that the most practical proposal is the levy of a uniform federal pay-roll tax, 90 per cent of which should be allowed as an off-set to employers contributing under a compulsory state unemployment compensation act,"

the purpose being to afford a requirement of a reasonably uniform character for all states cooperating with the federal government and to promote and encourage the passage of unemployment compensation laws in the state; *the 10 per cent. not off-set being used for federal and state administration of this "broad system".* (Cong. Rec., Vol. 79, Pt. 1, p. 599).

1.—(B)—REPORT OF THE PRESIDENT'S COMMITTEE ON ECONOMIC SECURITY.

Throughout the report of this committee we find the announced sole purpose of the proposed legislation is to create and maintain, in keeping with the President's messages, a system of uniform unemployment compensation laws. Throughout the report it is made plain that the *monies which are to come from pay rolls are to be the basis for the unemployment insurance.* Among other things, in referring to unemployment insurance, the report states:

> "While we favor unemployment compensation in cash, we believe that it should be provided for limited periods on a contractual basis and without governmental subsidies. Public funds should be devoted to providing work rather than to introduce a relief element in what should be strictly *an insurance system.* * * *
>
> "We recommend as essential the imposition of a uniform pay roll tax *against which credits shall be allowed to industries in states that shall have passed unemployment compensation laws.*" (Report to the President of Committee on Economic Security, p. 14, et seq.)

The committee referred frankly to the "tax credit *device*" which it preferred to a system in which the tax would be wholly collected and then remitted to the states as grants in-aid.

In making the recommendations as to what it termed the "technique" of establishing a federal-state unemployment insurance system the committee proceeds in the conviction that its purpose could be most promptly and

effectively accomplished by federal legislation which would, among other things, (1) *produce uniformity* in the burden by levying a pay roll tax, (2) *stimulate* the passage of compensation laws by the state, by allowing a credit against the federal tax for contributions paid under state laws, the credit to be allowed "only if the state is *cooperating* with the federal government in the administration of unemployment compensation, *expending* the money raised solely for benefits, and in *depositing* all contributions as collected in the Unemployment Trust Fund *in the United States Treasury.*" (Ib. p. 18).

In anticipation of Congress increasing and making more uniform and complete federal control over the administration of the uniform state laws, the committee recommended that the federal act expressly provide that all states must include in their statute a provision for repeal and amendment so as to avoid any *"vested interest"* resulting thereunder, in order that Congress could at any time increase the requirements with which state laws *must* comply.[1]

The report expressed the thought that the offset permitted to any employer who contributes under a compulsory state law "will encourage the speedy enactment of state laws which meet minimum standards of security and fairness." (Ib. p. 17).

The committee recommended that the federal government should grant the states sufficient money for proper administration "under conditions designed to insure

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[1]This suggestion was not only carried out in the federal act (Section 1104), but, in order to make the state's surrender of sovereignty coextensive with the congressional usurpation, it was inserted in the Alabama Act by the amendment of April 21, 1936, of Section 18, so as to provide that "the Legislature reserves the right to amend or repeal all or any part of this Act at any time; and there shall be no vested private right of any kind against such amendment."

competence and probity." Selection of personnel on a merit basis is vital to success.[2]

The committee stated that the grant (appropriated under Title III) for administration would be paid for by the ten per cent. of the tax (imposed by Title IX) against which no credit is allowed.

1.—(C)—HEARINGS BEFORE COMMITTEE ON WAYS AND MEANS OF THE HOUSE OF REPRESENTATIVES, AND ON FINANCE OF THE SENATE.

The bald purpose to use the taxing power as a device or disguise for the accomplishment of objects beyond the power of Congress became even more unmistakable during the hearings before these committees. Time and space prevent bringing all the evidence of this before the court, but the following is set forth as being illustrative and illuminating.

William M. Leiserson, Chairman of National Mediation Board, and a member of the Technical Board on Unemployment Insurance of the Committee on Economic Security, said

> "The Federal law is designed only to collect this tax *in order to get the states to enact certain laws.*" (Hearings before House Ways and Means Committee, p. 418).

Dr. E. E. Witte, Executive Director, Committee on Economic Security, frankly stated that,

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[2]To insure irrevisable power in the federal government as to determining personnel and its selection, one of the "must" provisions of the act as adopted recites that "(1) all compensation is to be paid through public employment offices in the state *or such other agencies as the Board may approve.*" [903(a)]. The Alabama Act, as originally drawn, provided for the creation of public employment offices. This was stricken by amendment, thus leaving the payment of all compensation to "such other agencies as the Board may approve."

"If there should be state laws that are utterly unfair we have a *club* here; *we won't give them the administration fund, and they won't be able to administer the law at all unless they dig into their own pockets to pay the administration costs. They cannot use the unemployment compensation fund for that.*" (Hearing before Committee on Ways and Means on H. R. 4120, p. 154.)

"Offsetting these appropriations will be the receipts from taxes which are imposed in connection with unemployment compensation and old-age annuities. Unemployment compensation will not involve *any cost* on general revenue." (Ib. 136).

Mr. Leiserson, in supporting the credit device plan in preference to a straight out subsidy plan, referred to the fact that the Supreme Court had said in the Child Labor Cases that Congress could not "under the guise of a federal regulation" regulate conditions within the states. But, Mr. Leiserson hoped:

"* * * Maybe they ('the Supreme Court') will not hold that now. But I felt, and most of the members of committee felt, that we can not jeopardize this step that needs to be taken now on any theoretical argument about what the Supreme Court might or might not do." (Ib. pp. 400-1.)

Mr. Hill, a member of the committee, adverted to the grant-in-aid system of constructing highways, describing that grant as a pure subsidy arising from general taxes and paid out of the treasury. He added, however, that the subsidy for roads

"does not involve, of course, the question of levying taxes upon employers or employes to raise the fund." (Ib. 413).

Mr. Leiserson replied that the highways could be connected with interstate commerce, whereas it

> "would be pretty difficult to connect manufacturing of, let us say, pocketbooks within a state to interstate commerce." (Ib).
>
> * * * *
>
> "The federal law is designed only to collect this tax in order to get the states to enact certain laws."[1]

William Green, President of the American Federation of Labor, advised that the grant-in-aid plan be adopted so as to lessen the question of constitutionality. (Ib. 389).

Abraham Epstein, Executive Secretary of the American Association for Social Security, advised separate bills,—one as a tax measure. In the other he proposed that Congress would say to the legislatures of the states that if they want protection for their people, and if they will guarantee that they will administer such a system rightly *"we will turn over to you the money we collect from your state."* The governors and the legislatures will see that the tax is enacted. (Ib. pp. 563-4). His suggestion as to splitting up the measure into two bills, he stated, was based on the idea that

> "it is safer constitutionally to separate the revenue raising part from the disbursement part. . ." (Ib. p. 564).

He stated that by separate bills one step is taken away from the constitutional problems,[1] and the entire plan in

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[1]It will be found that the specter of lack of congressional power continued to arise throughout the consideration of this legislation. Of course, at that time the decisions of the Supreme Court of the United States in the cases of United States v. Butler, 297 U. S. 1, and Carter v. Carter Coal Company, 298 U. S. 238, had not been handed down.

the same bill would permit the court to say "you set up that tax for a specific purpose," the answer to which would be, if separate bills were provided,

> "* * * 'Why, we set up the tax, that is all. That was just the revenue for the government, general revenue. We happen to be disbursing an equal sum in a separate bill.' Well, that is another story." (Ib. p. 565).

Alvin Hansen, Chief Economic Analyst, Department of State, stated that the amount withheld (the 10 per cent.) would be used for the purpose of subsidizing or making grants-in-aid to the state employment offices and building up the standards of administration of the various states. (Ib. 380).

Senator Black brought out from Senator Wagner that if the state desired to raise its benefits through some other method of taxation, as by correcting the maldistribution of income, "it would not be permitted to do so under the bill as framed, and secure federal aid and credit on federal taxes; that the funds intended for state administration come from the 10 per cent. retained by the federal government." (Hearings before Senate Committee on Finance pp. 23-24.)

Senator Black also said that except for administration the state had no funds to expend except from the funds raised in such state (Ib. p. 120); that the state could not substitute excess profits or any other tax for the contribution exacted of employers (and employes); that (except for the claimed precedent of the inheritance tax credit plan) there is no precedent (which Miss Perkins could at the moment think of) for this "system of federal aid, we will call it, *or federal coercion*,—that is what it amounts to, so far as I am concerned." (Ib. p. 122.).

Senator Barkley asked for Miss Perkins' theory as to the justification for this *"form of coercion or intimidation, or whatever it is."* He fears the theory that Congress can say to a state, "If you do not pass a law yourself we are going *to take it away from you*, and you do not get any of it back. (Ib. p. 126).

1.—(D)—REPORTS OF CONGRESSIONAL COMMITTEES AND THE DELIBERATIONS OF THE LEGISLATIVE BODIES.

The reports of the legislative committees in reference to,[1] and remarks of senators and congressmen during the consideration of the federal act, are in such complete keeping with the statements made by sponsors of the legislation before the committees and by members of the committees that it is not necessary to bring them in detail to the attention of the court.

We, therefore, close the factual statement relating to this subdivision by stating that although approximately two hundred appearances were made before the committees of the Congress, the report of the hearings before the committees comprised 2492 pages, and the debates in Congress extended over a period of nine days in the House and six days in the Senate, with consideration being given the measure at other times, there can not be found one word to indicate that it was the *purpose* of the federal act to impose a tax for the support of the government. On the contrary, it appears that the taxing power of Congress was deliberately used as a "device" to shape, control and regulate purely domestic affairs and policies of the states, to wit, matters of compulsory insurance, pensions, minimum wages and relationships

[1]Senate Committee Report (No. 628, 74 Congress, 1st Session)
House Report (No. 615, 74 Congress, 1st Session.)

between employers and employes in no wise engaged in commerce between the states. It is manifest that the admitted intent of the act was to set up an inescapable inducement to the respective states to submit to the imposition upon them of the federally determined domestic policies, a system by which, on the one hand, the states are coerced so to submit by reason of heavy taxation, and, on the other hand, there is purchased, with staggering sums of federal funds, submission to federal regulation in respect of subjects reserved to the states by the Constitution of the United States. It appears without any adverse inference that the exactions imposed by Title IX were not intended to be taxes, but were called taxes for the purpose of enabling the Congress, under the pretense of levying a tax, to exert a power not granted to Congress by the Constitution of the United States, but reserved, by the Tenth Amendment, to the states.

2.—The Legislative History of the State Act.

The federal act was signed by the President on the 14th day of August, 1935. It was responsive to the purposes so clearly indicated by its past history and so forcefully pronounced by its sponsors.

The state act, fashioned in Washington in accordance with the federal pattern, became, on the 14th day of September, 1935, the first state law enacted after the enactment of the federal act. Within a few days after the enactment of the federal act, a model was brought to the Alabama Legislature in session at Montgomery, and, with the addition of the provision imposing a one per cent. tax upon employes, was adopted, as shown by the legislative journal, in six legislative days,—one day more than the shortest period possible under the Alabama system of enacting legislation. It is amazing and is con-

clusive of the lack of legislative effort at classification and of the complete surrender of state sovereignty to the coercion of Title IX and the purchase of Title III of the federal act that a measure of such tremendous importance was routed through the Rules Committees of the two Houses, reported and advanced upon the calendar for immediate action without hearing before either committee, and adopted by unanimous vote without debate.

Prior to the enactment of the federal model by the Alabama Legislature this question had never been given any consideration in the State of Alabama. No economic or actuarial surveys had been made; there were in existence no data as to unemployment experience, and there was a complete lack of any information to serve as a base either as to the amount of money that would be required to cure or alleviate the evils of unemployment or as to the amount of funds that would be necessary to pay the benefits contemplated under the schedules set up in the act. (Halfpenny Affidavit, R. pp. 182-185, 186). The act itself, in recognition of the fact that there had been no previous surveys or research to serve as a base for any reasonable classification of the employers and employes included or excluded from the provisions of the act, provided for a merit rating to begin in the year 1941. This provision of the act [Section 4(c)] prevents an employer from being considered for merit rating unless he has had an experience of "at least three calendar years throughout which his employees received or could have received benefits when and as unemployed and eligible." These provisions for merit rating, based on experience, accompanied by the complete absence of any provision for hearing or judicial review, or any definition, test or standard, leave the state act to be considered as one without provision for merit rating past, present or future. The conclusion inevitably follows that the Legislature

acted without any regard to state history, the necessity of or the amount needed for relief of unemployment, the financial ability of those upon whom the cost was saddled, and was actuated solely by the coercion-purchase of the federal act. *Thus, the legislative history of the state act nakedly discloses its federal parentage.*

3.—The Terms and Provisions of the Acts.

The absolute dependency of the state act upon the federal act from a practical and intrinsic standpoint is demonstrated by a comparison and analysis of the two acts.

TITLES.

The title of the federal act is, among other things, "to *enable* the several states to make more adequate provision for the administration of their *unemployment compensation laws*"; that of the state act is, among other things, "to create a system of *unemployment compensation;* to provide for an *unemployment compensation fund;* to authorize reciprocal benefit arrangements with other states or the *federal government;* to establish an *unemployment compensation fund*".

THE INDISSOLUBLE UNION OF TITLE III AND THE STATE ACT.

Section 301, Title III, of the federal act makes a direct grant of federal funds to each state which has *"an employment compensation law approved by the Board * * * for the purpose of assisting the states in the administration of their unemployment compensation laws"*, while Section 302 provides for the payment to each state of "such amounts from the appropriation as the *Social*

Security Board determines to be necessary for the proper administration of the state law", the determination to be based, among other things, on "(3) *such other factors as the Board finds relevant.*"

Section 16 of the state act creates a special fund designated as "the unemployment compensation administration fund" *to be expended solely* for the *administration of the act* with the provision that all *federal moneys* alloted or apportioned to the state by the *Federal Social Security Board* shall be paid into the *unemployment administration fund.*

Section 17 of the state act carried an appropriation for administrative expenses. This appropriation was repealed by an amendment to Section 17 of the act (adopted on April 21st, 1936); therefore, the administration of the state act is dependent *solely upon federal largess which is dependent upon the irrevisable discretion of the Federal Board.*

Section 302 of the federal act authorizes the payment out of the sums appropriated by the Secretary of the Treasury only upon certificate of the Board.

Section 303 (a) provides that the Board *shall make no certification* for payment to any state unless it finds that the law of such state, approved by the Board under Title IX (note the tieing together of Titles III and IX), includes provisions for:

(1) Such *methods of administration* (other than those relating to selection, tenure of office, and compensation of personnel) as *are found by the Board to be reasonably calculated* to insure full payment of unemployment compensation when due[1]; and

(2) *Payment* of unemployment compensation *solely*

[1]Thus all methods of administration are under the irrevisable dictation of the Federal Board.

through public employment offices in the state *or such other* agencies as the Board may approve[1]; and

(3) Opportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied; and

(4) The *payment* of all money received in the employment fund of such state, *immediately upon such receipt,* to the Secretary of the Treasury to the credit of the Unemployment Trust Fund established by Section 904; and

(5) Expenditures of all money requisitioned by the state agency from the Unemployment Trust Fund, *in the payment of unemployment compensation,* exclusive of expenses of administration; and

(6) The making of such reports, in such form and containing such information, as the Board may from time to time require, and compliance with such provisions as the Board may from time to time find necessary to assure the correctness and verification of such reports; and

(7) Making available upon request to any agency of the United States charged with the administration of public works or assistance through public employment, the name, address, ordinary occupation and employment status of each recipient of unemployment compensation, and a statement of such recipient's rights to further compensation under such law.[2]

Section 303(b) of the federal act provides that whenever the Board, after reasonable notice and opportunity for hearing to the state agency charged with the administration of the law, finds that there is,—

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[1]Section 10(j) of the original state act required the Commission to establish and maintain free public employment offices, etc. This was stricken by the amendment of April 21, 1936, thus requiring payment to be made exclusively through federal officers or control.

[2](6) and (7) constitute a complete surrender to the federal government of state sovereignty over employe relationship.

(1) A denial, in a substantial number of cases, of unemployment compensation to individuals entitled thereto under such law; or

(2) A failure to *comply substantially with any provision specified* in sub-section (a) of Section 303; the Board shall notify such state agency that further payments will not be made to the state until the Board is satisfied that there is no longer any such denial or failure to comply. Until it is *so satisfied it shall make no further certification to the Secretary of the Treasury with respect to such state.* [Section 303(a) leaves it to the irrevisable discretion of the Federal Board as to whether the state shall receive any funds, while Section 303(b) gives them the irrevisable right to take it away.]

The state act accepts the above quoted provisions of the federal act and by (i) of Section 10 expressly provides for state-federal cooperation and for the acceptance of "any sums allotted or apportioned to the state for such administration" and for compliance with "all reasonable federal regulations governing the expenditures of such sums." All Alabama contributions *immediately* go to the United States Treasury and can be *requisitioned only* for payment of unemployment compensation, which means that if the state act is invalid, the funds are beyond recovery.

Not only therefore, is the operation of the state act made dependent upon the funds to be supplied by the federal act, but its functioning is dependent upon the whim of the Federal Board charged with the duty of administering the federal act. The Board, among other things, has the right to determine methods of administration, to designate the agencies through whom payment of all benefits is to be made; to assure itself that the money requisitioned by the state agency from the Unemployment Trust Fund in Washington goes solely to the pay-

ment of unemployment compensation, exclusive of expenses of administration; to require the making of any reports of any kind or character and the making available upon request to any agency of the United States of the name, address, occupation and employment status of every individual in Alabama receiving unemployment compensation. Not only is the Board given these plenary rights, but having received the power of determining the amount that the State is to receive under the court martial provision (Sec. 302(a) 3) based "on such factors as the Board finds relevant", and being without authority to give a certificate for requisition of funds thus allotted unless the provisions of Section 303(a) are all complied with, it is then given the absolute right for all time to take away from the state any future payments if it is of the opinion that the State has in any way failed to comply substantially with the provisions of Section 303(a) or has denied in a substantial number of cases unemployment compensation to individuals entitled thereto.

THE INDISSOLUBLE UNION OF TITLE IX OF THE FEDERAL ACT AND THE STATE ACT

Section 901 of Title IX of the federal act imposes on and after January 1, 1936, on every employer (as defined in Section 907) for each calendar year, an excise tax with respect to having individuals in his employ equal to the following percentages of the total wages (as defined in Section 907) payable by him (regardless of the time of payment) with respect to employment (as defined in Section 907) during such calendar year:

1.—One per cent. for the calendar year 1936;

2.—Two per cent for the calendar year 1937;

3.—Three per cent. for every calendar year after December 31, 1937.

Section 4 of the state act exacts from employers contributions to be paid by each employer *"in such manner and at such times as the Commission may prescribe."*

The state act, unlike Title IX, but similar to Title VIII, of the Federal Act, imposes an income tax on each employe amounting to one per cent. of his wages, the employer being made responsible for withholding the tax from the wages of his employes, showing the deduction on his pay roll records, and transmitting the same to the Commission.

Section 902 of the federal act provides for a check-off or credit not in excess of 90% of the excise tax imposed by Section 901, the credit to be "allowed only for contributions made under the laws of states certified for the taxable year as provided in Section 903." Regulations 90 of the U. S. Treasury Department, relating to the excise tax of employers, and conforming regulations of the State Commission (R. p. 141-145), provide as a sine qua non for obtaining the credit that "the Treasury Department must be furnished with a certificate from the Unemployment Compensation Commission showing the amount of contribution the employer has made to the fund," together with such further information as may be required showing that the state law has been approved by the Social Security Board in accordance with the provisions of Section 903(a) of the federal act.

Until and unless Alabama enacts an operative ememployment compensation law approved by the Federal Board, employers will be compelled to to pay the full amount of the attempted tax imposed by Section 901 of the Federal Act and will be deprived of the credit provided for by Section 902 and also of any additional

credits allowed within the discretion of the Board by Sections 909(a) and 910 (a). It is significant to compare this provision for credit with the provision in the Guffey Coal Bill, which was stricken down by the Supreme Court of the United States because it was a penalty disguised as taxation and therefore not within the orbit of congressional power. (Carter v. Carter Coal Co., 298 U. S. 238.)

The Guffey Bill, after imposing on the coal "an excise tax of 15 per centum on the sale price at the mine, or in the case of captive coal, the fair market value of such coal at the mine," provided for a credit in the following language:

> "Provided further, That any such coal producer who has filed with the National Bitumious Coal Commission his acceptance of the code provided for in sections 805, 806, 807 and 808 of this chapter, and who acts in compliance with the provisions of such code, shall be entitled to a drawback in the form of a credit upon the amount of such tax payable hereunder equivalent to 90 per centum of the amount of such tax, to be allowed and deducted therefrom at the time settlement therefor is required, in such manner as shall be prescribed by the Commissioner of Internal Revenue. Such right or benefit of drawback shall apply to all coal sold or disposed of from after the day of the producer's filing with the Commission his acceptance of said code in such form of agreement as the Commission may prescribe. No producer shall by reason of his acceptance of the code provided for in sections 805, 806, 807 and 808 of this chapter or of the drawback of taxes provided in this section be held to be precluded or estopped from contesting the constitutionality of any provision of said code, or its validity as applicable to such producer." (Aug. 30, 1935, c. 824, g 3, 49 Stat. 993.)

There is a complete tie-up between the federal and state act in reference to the amount of the exaction and the provision for credit against the federal tax. The state exaction imposed by Section 4 carries the exact percentages necessary to absorb the credit of 90 per cent provided for by Section 902 of the federal act. Not only is this true, but the two acts are so unfied, together with the regulations adopted by the Treasury Department and those adopted by the state agency, as to allow the credit only upon the certificate of the state officer being furnished to the United States Treasury Department.

It therefore appears that it is only through the perfect coordination and cooperation existing between the two acts that the Alabama taxpayer, even though the Alabama statute has been approved by the Federal Board, can secure the benefit of the credit allowance.

Note also that under the regulations adopted by the Treasury Department not only must a certificate of the state agency be furnished before the credit is allowed, but proof must be furnished the Treasurer as a condition precedent to the allowance of the credit that the Federal Board has "found that the law of the State contains the provisions specified in Section 903 of the Act."

The federal act (Sec. 904) and the state act (Sec. 3) create an unemployment compensation fund which is to be deposited in the securities of the Federal Unemployment Trust Fund, which fund must be used *solely* for the purpose of paying compensation benefits; the funds so deposited not only pass entirely under federal control, but are "invested as a single fund," together with all funds paid in from all other states adopting a federally approved unemployment compensation law. The investment therefore becomes a mixed pool, with no earmarks separting the funds of Alabama from any other state.

It is also provided by both acts that the moneys paid into the investment pool can never be withdrawn or requisitioned by the state except for the purpose of being *"used solely in the payment of compensation exclusive of expenses of administration"* [Sec. 903 (4) federal act]; the state act [Sec. 3 (d)] providing that the investment must be made in the Federal Unemployment Trust Fund *"so long as said Trust Fund exists, notwithstanding any other statutory provision to the contrary" and* [Sec. 3 (b)] that *"the fund shall be administered in trust and used solely to pay benefits"*; assuring complete control over the funds by the express reservation of the right to amend or repeal, and by the express provision that *"there shall be no vested private right of any kind against such amendment or repeal"*[1] and by making provision in the event either Title III or Title IX is held unconstitutional, there shall be returned only the unexpended portions of the "levies, contributions, taxes or pay roll deductions."

There is no provision made of any kind in either act by which either the state or contributors or taxpayers are provided a remedy for recovery of any portion of the funds in the event of the judicial determination that either the federal or the state law is unconstitutional.

It is contended by appellants that those who pay in the exactions may derive comfort from Section 904 (f) of the federal act, which provides, "The Secretary of the Treasury is authorized and directed to pay out of the fund to any State agency such amount as it may duly

[1]We have previously seen that the purpose of this provision was to reserve to the Congress the unlimited right to impose such additional regulatory rules upon state agencies as a condition precedent for federal funds and credit allowances as the Congress might see fit to enact. The federal foot having thus been planted firmly within the door to the citadel of state sovereignty, no doubt was left as to the future intention of taking complete possession. The state's acquiesence to this federal control is indicated by its enactment on April 21, 1936, of the amendment to Section 18 of the state act.

requisition not exceeding the amount standing to the account of such State agency at the time of such payment." It must be remembered, however, that the federal act expressly provides [Section 903 (4)] that "all money withdrawn from the Unemployment Trust Fund by the state agency shall be *used solely* in the payment of compensation, exclusive of expenses of administration" and that the state act authorizes the Alabama agency to withdraw from the Unemployment Compensation Fund funds to be *"used solely to pay benefits"* [Sec. 3 (b)]. Both laws check and double check the intention of both legislative bodies to place Alabama funds into the Federal Treasury and to so provide that they can never be taken out of the Federal Treasury unless the federal law is complied with in all respects, and expressly and specifically unless it is requisitioned for the *sole purpose* of being paid out for compensation benefits. Therefore should the Alabama law be held invalid and no law approved by the Federal Board should be in effect in Alabama, the return of this money depends upon the grace of Congress and the Legislature. Not only is this true as a matter of fact, but the fact is emphasized because neither act provides in the event of invalidity for any suit or recovery by way of refund or otherwise.

Had the state act made adequate provision for the refund of this money, Article 23 of the Constitution of the State of Alabama (Acts 1933, Ex. Ses. 196) and the Budget and Financial Control Act of Alabama (Acts 1932, Ex. Ses. 35, 40) provide that all appropriations are conditional and proportionate and are to be prorated with other obligations each year, the sums remaining unpaid at the end of each fiscal year to lapse absolutely. The constitutional and statutory provisions are construed as providing that the essential expenses of government are to be paid in full as preferred claims, after which all

other claims are prorated. *Abrahamson v. Hard*, 229 Ala. 2. For the fiscal year ended September 30, 1936, only 30.15% of the appropriations was paid. The Comptroller General's official estimate is that for the current year 31.035% will be paid. (See Reports of Comptroller General, last quarter 1935-36 fiscal year, and first quarter, 1936-37 fiscal year).[1]

We have set forth above the principal tie-ins between the two acts. There are many others. For illustration, refer to Section 10(e) and Section 10(i) of the state act, and compare Section 907(a) of the federal act with Section 2(f) of the state act, 907(b) with Section 2 (o), 907(e) with Section 2 (j), 907(f) with Section 2(c), 907(g) with 2(a), 903(5) and (5a) with Sections 6 (1 and 2) of the state act.

SUMMARY AS TO THE INSEPARABILITY OF THE FEDERAL AND STATE ACTS, THE COMPLETE DOMINANCE OF THE FEDERAL ACT, AND THE COMPLETE SUBSERVIENCE OF THE STATE ACT.

The state has, in all substantial particulars, adopted the plans, provisions, requirements, definitions and nomenclature of the federal act; all funds for the payment of cost of administration of the state act depend upon the appropriations of the federal act; the operation of the state act, both in methods of administration and in

[1]The Legislature of Alabama in February, 1937, (subsequent to the rendition of the final decree in this case) attempted to relieve these funds from the operation of the budget provisions of the Alabama Constitution by amending Section 18 of the act as first amended by providing that unexpended funds in the Federal Unemployment Trust Fund to the credit of the state should, in the event of a declaration of unconstitutionality of either federal or state act, be returned to the Commission and be distributed by the Commission pro rata to the contributors instead of being covered into the treasury of the state and subject to the budget provisions of the Constitution. This amendment makes no provision for the return of employe contributions.

the payment of benefits, is dependent upon the provisions of the federal act and the decisions of the federal board; all taxes exacted under the state act are immediately upon collection placed without the state and in the Federal Unemployment Trust Fund with withdrawal limited to requisitions for the payment of benefits under a continually approved federal act. The evidence in this case shows without conflict that in the year 1938, if the state act continues in force, the State of Alabama will turn over to the federal government approximately eight million dollars with complete possession and control thereof vested in the federal board and subject to Section 1104 of the federal act, providing that "the right to alter, amend or repeal any provision of this act is hereby reserved to the Congress," and with the parallel provision of amended Section 18 of the state act providing that there shall be no vested private right of any kind against amendment or repeal. This makes the duration of the state act, so far as its potential operation is concerned, dependent upon conditions which may, at any time in the future, by amendment or repeal of the federal act in whole or in part, be changed. IT THEREFORE FOLLOWS IF THE CONGRESS SHOULD CHANGE THE FEDERAL ACT AND NO LONGER PERMIT THE WITHDRAWAL OF THE FUNDS, THERE IS NO PROVISION TO COMPEL RETURN OF THE MONEY.[1]

[1]Appellants seek to compare the appropriations made to the states under Title III of the federal act to federal-grants-in-aid of the type of public road grants, etc. It is only necessary to read the above analysis to see how entirely different, both in principle and effect, these grants are from the appropriations made under Title III.

4.—The Administrative Acts of the Board and Commission Entrusted with the Administration of the Respective Acts.

The Board, in its administrative releases interpretative of the federal act, recognizes the complementary state and federal acts as an integral system of unemployment compensation in these words:

> "The entire plan of unemployment compensation is a cooperative federal-state system. It insures uniformity with respect to the cost of employers which is essential to make it possible for the states to legislate in this field. It assures the safety of all reserved funds and seeks to secure the efficient administration of unemployment compensation throughout the country."

It is common knowledge in Alabama that the state commission is subject to the nod of the Federal Board; that no question of policy can be determined without federal approval; that in this and similar legislation pending and in the courts the state commission was threatened by the Federal Board with the withdrawal of federal appropriations if it entered into escrow agreements with Alabama taxpayers depositing the exactions due and to become due under the terms of the act, pending the decision by this court of the validity of the federal act and/or of the Supreme Court of Alabama of the state act.

Among other acts of the Board indicating its intent to use arbitrary power over state agencies is its release, No. 295, of Jan 25, 1937. This ruling prohibited all states from requiring employes to sign state severance reports, these reports indicating the leaving by the employe of his employment and the reason for leaving. The

Board acting under the authority of Section 303(a) of the federal act, prohibited the requirement of these severance reports on the theory that the employer might use duress on the employe, thus requiring him to give a false reason for leaving which might subsequently affect his eligibility for compensation under the act. In order to leave no doubt as to what would happen if the states did not obey this ruling, the Board, in its Release, called attention to the fact that all service appropriations are in its hands. Otherwise stated, unless the state agencies submit to the ruling no funds would be approved for administrative purposes. *The whole argument may be summed up in the statement of fact that the Board holds the purse strings on all appropriations under Title III and the Board, in cooperation with the Treasury Department, has an irresistable power over the issuance of credit memoranda under the provisions of Title IX.*

Brief and Argument

FOREWORD

In considering the decree appealed from, this Court will not confine itself to the reasons assigned by the District Court for its decree, but will reexamine the whole record and the findings upon the law and the evidence therein.

Essgee Company vs. United States, 262, U. S. 151-153.
United States vs. Holt Bank, 270 U. S. 49-56.
Keller vs. Potomac Elec. Co., 261 U. S. 428-444.
L. & N. Railroad Co. vs. Garrett, 231 U. S. 298-304.

The District Court in rendering its opinion sustaining its decree issuing temporary and permanent injunctions based its finding on the conclusion that the state act was invalid:

(a) Because in violation of the 14th Amendment to the Constitution of the United States in that the classification of employers was unreasonable, arbitrary and capricious, and

(b) Because in violation of section 23 of the Consituation of Alabama. (R p. 298).

While we submit that the District Court was correct in holding the state act unconstitutional for the reasons assigned by it, it is our conviction that there are many other equally, if not more important reasons appearing in the record as a basis for the asserted unconstitutionality of federal and state acts, and for this reason we respectfully ask the indulgence of the court in presenting for its consideration the entire record.

THE INVALIDITY OF THE STATE ACT ENTITLES PLAINTIFF TO INJUNCTIVE RELIEF.

If the State Act be invalid for any reason plaintiff's only adequate protection is an injunction. If the moneys required of plaintiff by the terms of the state act are paid to the Commission plaintiff is without remedy to collect them back. There are so many reasons why plaintiff is without this remedy we shall not further expand this brief in reciting them all. They are set out in Paragraphs 18 and 19 of the bill (R. pp. 21-24 incl.). They may be roughly grouped as follows:

(a) There is no statute or principle of law in Alabama permitting recovery of such payments once they are made. The state act with reference to refund of taxes erroneously paid does not comprehend such exactions as these. In fact, the representatives of the Commission contend that this is not a tax. They are compelled so to contend. If they admit this to be a revenue measure it is void because it originated in the Senate. If not a tax, of course, it does not fall within the statute providing under certain circumstances for the refund of taxes.

(b) If plaintiff had a right of action it would be only against the individuals who received the moneys. Such suit would be utterly ineffective, as these individuals do not and cannot retain the moneys, but are compelled immediately to remit them to the Board at Washington.

(c) There is no provision for suit to be brought by a person who pays taxes to Alabama officials against any official or agency of the federal government.

(d) Judgment against Alabama officials would be uncollectible as, of course, they would be individually

unable to respond to the demands for the millions of dollars here involved.

(e) Owing to the duality of receipt, custody and control plaintiff would be without remedy because the sovereign to whom the plaintiff paid would no longer have the moneys and the sovereign who had the money sustains no relationship of privity to plaintiff.

(f) The interplaying statutes, state and federal, expressly provide that money can be returned from the national to the state agency *only* for payment of benefits to unemployed eligibles.

(g) Even if judgment could be rendered against the State of Alabama, or any bureau, department or official thereof, plaintiff's recovery would be only a drastically reduced percentage of what plaintiff paid. Article 23 of the Constitution of the State of Alabama (Acts 1933, Ex. Ses. 196) and the Budget and Financial Control Act of Alabama (Acts 1932, Ex. Ses. 35, 40) provide that all appropriations are conditional and proportionate and are to be prorated with other obligations each year, the sums remaining unpaid at the end of each fiscal year to lapse absolutely. The constitutional and statutory provisions are construed as providing that the essential expenses of government are to be paid in full as preferred claims, after which all other claims are prorated. *Abrahamason v. Hard*, 229 Ala. 2. For the fiscal year ended September 30, 1936, only 30.15% of appropriations was paid. The Comptroller General's official estimate is that for the current fiscal year 31.035% will be paid. (See Reports of Comptroller General, last quarter 1935-36 fiscal year, and first quarter, 1936-37 fiscal year).

It is, we submit, obvious that there is no adequate remedy at law. Certainly the most that could be claimed by defendants is that there may be room for a possible contention that plaintiff, after paying, would have

a remedy to recover back at law. Of course, if there is any doubt as to whether or not plaintiff has such remedy at law, this uncertainty of remedy would require the issuance of an injunction.

> "It is a settled principle of equity jurisprudence that if the remedy at law be doubtful a court of equity will not decline cognizance of the suit. Teague v. Russell, 2 Stewart (Ala.) 420. Where equity can give relief plaintiff ought not to be compelled to speculate upon the chance of his obtaining relief at law."

Davis v. Wakelee, 156 U. S. 680, 39 L. Ed. 578.

In holding that injunction properly issued, in *Wallace v. Hines*, 253 U. S. 67, the Court quoted from *Union P. R. Co. v. Weld County*, 247 U. S. 282, as follows:

> "We ought not to leave the plaintiffs to a speculation upon what the state court might say if an action at law were brought."

Both in the Weld case and in *Atlantic Coast Line v. Dalton*, 262 U. S. 425, 426, the Supreme Court held that injunction should issue where there was any doubt as to whether or not a statute authorized recovery of illegal taxes and the Supreme Court of the state had not passed upon the question. Says the Court in the latter case:

> "But the statute mainly relied upon is a recent one, which appears not to have been construed and applied by the highest court of the state. In the absence of such decision we cannot say the remedy at law is plain and adequate."

See to the same effect *Dawson v. Kentucky Distillery*, 255 U. S. 288, 295; *Stafford v. Wallace*, 258 U. S. 495; *Miller v. Nut Margarine Co.*, 284 U. S. 298; *Ohio Oil*

Co. v. Conway, 279 U. S. 813, 815; *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 12; *Pierce v. Society of Sisters*, 265 U. S. 510; *Vicksburg Water Works Co. v. Vicksburg*, 185 U. S. 84.

The threat of harassing repetition (here monthly reports and payments must be made) itself constitutes ground of injunctive relief.

Bank of Kentucky v. Stone, 88 Fed. 383, 392, 174 U. S. 799;

In the Agricultural Adjustment Act Case the Supreme Court held that injunction was the proper remedy:

Rickert Rice Mill, Inc., v. Rufus W. Fontenot, 80 L. Ed. (Adv. Op.) 355.[1]

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[1]The recent opinion of the Supreme Judicial Court of Massachusetts in the case of *Howes Bros. Co., vs. Massachusetts U. C. Commission*, 5 N. E. (2nd) 720-25, cited by appellants, while, as we contend erroneous in its final conclusion, is correct on the question of the remedy when it uses the following language: "The cases at bar set forth extraordinary and exceptional circumstances which justify the interposition of equity. The contributions exacted by the Unemployment Compensation Law are not described therein as taxes. Failure to make the required contribution is denounced under heavy penalties. Section 50. If the contributions are paid and the statute should be held to exceed the constitutional power of the General Court, no definite provision is made for recovery in any form of actions of the amounts paid. Indeed, by section 43 'no person shall be or be deemed to be vested with any property or other right by virtue of the enactment' of the law. The remedies open to the plaintiffs at law are not plain, adequate and complete. The plaintiffs have a direct interest in the subject matter. Without impairing the force of the general rule just stated, the extraordinary circumstances here disclosed afford jurisdiction in equity. Hill v. Wallace, 259 U. S. 44, 62, 42 S. Ct. 453, 455, 66 L. Ed. 822; Terrace v. Thompson, 263 U. S. 197, 215, 44 S. Ct. 15, 17, 68 L. Ed. 255; United States v. Butler, 297 U. S. 1, 60, 61, 56 S. Ct. 312, 316, 317, 80 L. Ed. 477, 102 A. L. R. 914; Rickert Rice Mills, Inc., v. Fontenot, 297 U. S. 110, 56 S. Ct. 374, 80 L. Ed. 513."

Part I.

THE STATE ACT IS DEPENDENT UPON THE VALIDITY OF TITLES IX AND III OF THE FEDERAL ACT. THESE TITLES BEING UNCONSTITUTIONAL, THE STATE ACT MUST FALL.

Proposition I.

THE CONSTRUCTION BY THE SUPREME COURT OF ALABAMA OF THE STATE ACT INSOFAR AS IT DOES NOT RELATE TO ITS VALIDITY VEL NON UNDER THE CONSTITUTION OF THE UNITED STATES WILL BE FOLLOWED BY THE SUPREME COURT OF THE UNITED STATES.

The construction of the highest state court of state constitution and laws will be followed by the Supreme Court of the United States.

Michigan vs. Michigan Trust Company, 286 U. S. 334.

Concordia Insurance Co. vs. School District, 282 U. S. 545.

Chicago M., St. P. & P. R. Co. vs. Ritsy, 276 U. S. 567.

Fairfield vs. County of Gallain, 100 U. S. 47-55.

Proposition II.

THE SUPREME COURT OF ALABAMA HAS SO CONSTRUED THE STATE ACT AS TO HOLD THAT BY ITS TERMS IT IS INVALID AND INOPERATIVE IF TITLE IX OR TITLE III OF THE FEDERAL ACT IS UNCONSTITUTIONAL.

Beeland Wholesale Co. v. Jacob L. Kaufman, as Chairman, et al., No. 198 Supreme Court of Alabama (In Manuscript).

Proposition III.

TITLES III AND IX OF THE FEDERAL ACT ARE BEYOND THE ORBIT OF CONGRESSIONAL POWER; THEY ARE INVALID BECAUSE (a) THE OBVIOUS PURPOSE IS TO CONSTRAIN THE SEVERAL STATES THROUGH COERCION AND/OR PURCHASE TO ENACT UNEMPLOYMENT COMPENSATION LAWS CONFORMABLE TO THE PATTERN PRESCRIBED BY CONGRESS; AND (b) THEY CONSTITUTE AN EFFORT ON THE PART OF THE CONGRESS, THROUGH THE EXERCISE OF ITS SPENDING AND ITS TAXING POWER, TO CONTROL THE SEVERAL STATES IN MATTERS EXPRESSLY RESERVED TO THE STATES AND TO THE PEOPLE BY THE TENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

It is submitted that the face of the federal act, its legislative history, the declarations of the President in his official relation to the matter, and the unconditional admission of the administrative agency in enforcing it, proclaim that the intent of the act is *unemployment insurance* and that it is impossible to reach the conclusion that its *purpose* was to raise revenue. Under the guise of taxation, Title IX of the federal act imposes heavy exactions upon employers and employes as the necessary means for the intended control by Congress of compulsory insurance. It seeks to prescribe for the states pol-

icies of compulsory insurance which are matters of purely internal and domestic concern to the states.

The exactions imposed by Title IX are not in fact taxes, but are called taxes for the purpose of enabling the Congress under the pretense of levying a tax to exert a power not granted to Congress by the Constitution of the United States, but reserved by the 10th Amendment to the states.

> "Congress cannot, under the pretext of executing delegated power, pass laws for the accomplishment of objects not entrusted to the Federal Government."
>
> *Linder vs. U. S.*, 268 U. S. 5; 69 L. Ed. 819.
> *U. S. vs. Butler*, 297 U. S. 1.

Appellees contend that because tax revenue is ostensibly provided by Title IX, all other purposes, however dominant and beyond congressional power, must be ignored and the tax must be sustained. We insist that beginning with McCulloch vs. Maryland, 4th Wheat 316 and ending with United States vs. Butler, 297, U. S. 1, and Carter vs. Carter Coal Company 298 U. S. 238, the established principle is that the dominant purpose of a legislative act, where plainly discernible from the face of the statute, its true legislative history and its direct and necessary effect, is the controlling test of the validity of the act.

The questions that this Court must determine in order to pass upon the validity of the federal act are whether Title IX of the federal act is a tax measure and whether Title III of the same act is merely an appropriation measure, or whether the two titles are but complementary parts of a regulatory statute, the purpose of which is to control matters not delegated to the federal government but which have, by the 10th Amend-

ment to the Constitution of the United States, been reserved to the states and to the people.

It will be conceded that the Congress, acting within its proper sphere, may impose heavy and burdensome taxes which, in fact, may result in the regulation of the subject taxed. It has been so held in the following cases cited by appellant:

Veazie Bank vs. Fenno, 8 Wall (U. S) 533, 19 L. Ed. 482 (Circulation of state bank notes);
McCray vs. U. S., 195 U. S. 27, 49 L. Ed. 78 (Sale of yellow oleomargarine);
U. S. vs. Doremus, 249 U. S. 86, 63, L. Ed. 493 (Manufactuer, importation, sale or gift of narcotics).

But the power of the Congress to levy a tax which results in the regulation of the subject taxed is limited to those cases where (a) the Congress has both the power to tax and the power to regulate the subject taxed, or (b) where the taxing act appears on its face to be solely a tax measure without specifications indicating a purpose to regulate matters of purely state concern.

In the Child Labor Tax Case, *Bailey vs. Drexel Furniture Co.*, 259 *U. S.* 20, 66 *L. Ed.* 817, *Chief Justice* Taft, in discussing the cases of *Veazie Bank vs. Fenno* (*supra*), *McCray vs. United States* (*supra*), and *United States vs. Doremus* (*supra*) made very clear this limitation of the powers of the Congress.

Referring to the *Veazie Bank* case, it was said:

> "It will be observed that the sole objection to the tax here was its excessive character. Nothing else appeared on the face of the act. It was an increase of a tax admittedly legal to a higher rate, and that was all. There were no elaborate specifications on the face of the act, as here, indicating the purpose to

regulate matters of state concern and jurisdiction through an extraction so applied as to give it the qualities of a penalty for violation of law, rather than a tax.

"It should be noted, too, that the court, speaking of the extent of the taxing power, used these cautionary words:

" 'There are, indeed, certain virtual limitations, arising from the principles of the Constitution itself. It would undoubtedly be an abuse of the power if so exercised as to impair the separate existence and independent self-government of the states or if exercised for ends inconsistent with the limited grants of power in the Constitution' " (p. 821).

Again, in referring to the *McCray case*, it was said:

"That, like the *Veazie Bank* case, was the increase of an excise tax upon a subject properly taxable, in which the taxpayers claimed that the tax had become invalid because the increase was excessive. It was a tax on oleomargarine, a substitute for butter. The tax on the white oleomargarine was one quarter of a cent a pound, and on the yellow oleomargarine was first 2 cents and was then by the act in question increased to 10 cents per pound. This court held that the discretion of Congress in the exercise of its constitutional powers to levy excise taxes could not be controlled or limited by the courts because the latter might deem the incidence of the tax oppressive or even destructive. It was the same principle as that applied in the *Veazie Bank* case. This was that Congress, in selecting its subjects for taxation, might impose the burden where and as it would, and that a motive disclosed in its selection to discourage sale or manufacture of an article by a higher tax than on some other did not invalidate the tax. In neither of these cases did the law objected to show on its face, as does the law before us, the detailed specifications of a regulation of a

state concern and business with a heavy exaction to promote the efficacy of such regulation" (p. 821).

And again, in commenting upon the *Doremus* case, it was said:

> "The provisions for subjecting the sale and distribution of the drugs to official supervision and inspection were held to have a reasonable relation to the enforcement of the tax, and were therefore held valid.
>
> "The court said that the act could not be declared invalid just because another motive than taxation, not shown on the face of the act, might have contributed to its passage. This case does not militate against the conclusion we have reached in respect to the law now before us. The court, there, made manifest its view that the provisions of the so-called taxing act must be naturally and reasonably adapted to the collection of the tax, and not solely to the achievement of some other purpose plainly within state power" (p. 822).

In holding the Child Labor Tax Act unconstitutional, this Court not only made the observations just above quoted but pointed out where the line limiting the power of the Congress to regulate through taxation must necessarily be drawn, and said:

> "Out of a proper respect for the acts of a coordinate branch of the government, this court has gone far to sustain taxing acts as such, even though there has been ground for suspecting, from the weight of the tax, it was intended to destroy its subject. But in the act before us, the presumption of validity cannot prevail, because the proof of the contrary is found on the very face of its provisions." (p. 819).

The case involving the Future Trading Act, *Hill vs. Wallace*, 259 U. S. 44, 66 L.Ed. 822, and the Bituminous Coal Conservation case (Guffey Coal Act Case) *Carter vs. Carter Coal Co.*, 298 *U. S.* 238, still further reinforce the reasoning in the Child Labor case.

In the Agricultural Adjustment Act case, *United States vs. Butler*, 297 *U. S.* 1, in speaking of the purported excise tax there involved, this Court said:

> "The tax can only be sustained by ignoring the avowed purpose and operation of the act, and holding it a measure merely laying an excise upon processors to raise revenue *for the support of the government*. Beyond cavil the sole object of the legislation is to restore the purchasing power of agricultural products to a parity with that prevailing in an earlier day. * * *
>
> "The tax plays an indispensable part in the plan of regulation * * *. The tax is to cease when rental or benefit payments cease. * * *
>
> "The statute not only avows an aim foreign to the procurement of revenue for the support of government, but by its operation shows the exaction laid upon processors to be the necessary means for the intended control of agricultural production."

Again, this Court, in answer to the contention that the exaction from processors was a tax said:

> "It is inaccurate and misleading to speak of the exaction from processors prescribed by the challenged act as a tax, or to say that as a tax it is subject to no infirmity. A tax, in the general understanding of the term, and as used in the Constitution, signifies *an exaction for the support of the Government. The word has never been thought to connote the expropriation of money from one group for the benefit of another.* We may concede that the latter sort of imposition is constitutional when

imposed to effectuate regulation of a matter in which both groups are interested and in respect of which there is a power of legislative regulation. But manifestly no justification for it can be found unless as an integral part of such regulation. The exaction cannot be wrested out of its setting, denominated an excise for raising revenue and legalized by ignoring its purpose as a mere instrumentality for bringing about a desired end. *To do this would be to shut our eyes to what all others than we can see and understand.* Child Labor Tax Case (Bailey v. Drexel Furniture Co.), 259 U. S. 20, 37, 66 L.Ed. 817, 819, 42 S. Ct. 449, 21 A. L. R. 1432."

"We conclude that the act is one regulating agricultural production; that the tax is a mere incident of such regulation, and that the respondents have standing to challenge the legality of the exaction" (pp. 292-293).

Section 902 of the Federal Act provides:

"The taxpayer may credit against the tax imposed by Section 901 the amount of contributions, with respect to employment during the taxable year, paid by him * * * into an unemployment fund under a State law. The total credit allowed to a taxpayer under this section for all contributions paid into unemployment funds * * * shall not exceed 90 per centum of the tax against which it is credited, and credit shall be allowed only for contributions made under the laws of states certified for the taxable year as provided in Section 903."

We cannot shut our eyes to the fact that the money received by the federal government under the tax imposed by the federal act is not in truth a tax. First, because *it is not* to be used for the purpose of supporting the federal government, and, second, because the whole structure and plan of the federal act, with its multitude of

elaborate rules and regulations, makes it so evident that "he who runs may read" that the act is designed primarily for the purpose of forcing states through coercion or purchase to adopt unemployment compensation laws which will, in effect, permit the regulation by the federal government of matters which are purely of state concern.

Section 201 of Title III of the federal act makes an appropriation of $49,000,000 for the purpose of "assisting the states in the administration of their unemployment compensation laws". The fact that this appropriation is made solely for the purpose of coercing or purchasing the states to enact and under federal control administer such laws is disclosed by the fact that under section 302 (a) the appropriations made by section 301 are not available to the states unless the state laws have been approved by the Board as fully complying with the detailed regulations prescribed by Title IX and contain in addition to such detailed regulation provisions for the administration of such laws in the manner prescribed by section 303 (a) and such provisions must be certified by said board as including provisions which in the opinion of the board are found to be reasonably calculated to insure full payment of unemployment compensation when due and as defined and provided in Title IX. Such state laws must, in order to be entitled to certification by said board, provide for the payment of said compensation solely through public employment offices *or such other agencies as the board may approve*. They must provide for an opportunity for fair hearing before an impartial tribunal (as an impartial tribunal is not defined, it must also be one that the board approves). Such state laws must provide for the payment of all money received by the states from taxes levied pursuant to such state laws immediately upon receipt to the Secre-

tary of the Treasury to the credit of the Unemployment Trust Fund. Such state laws must further provide for the expenditure of all money requisitioned by a state agency from such Unemployment Trust Fund in the payment of unemployment compensation exclusive of expenses of administration, thereby leaving the state agencies dependent solely upon federal appropriations for the expense of administering state laws. Such state laws must further provide for the making of reports in such form and containing such information as said board may from time to time require and such state laws must further make available upon request to any agency of the United States charged with the administration of public works or assistance, the name, address, occupation and employment status of each recipient of unemployment compensation.[1]

In addition to making state administrative bodies solely dependent upon the Federal Government for their compensation and expenses under the appropriations provided in Title III of the federal act, Title IX provides that as against the taxes therein levied upon employers the taxpayers may secure credit for all contributions paid under state laws up to 90 per cent of the federal tax. The condition upon which this credit is allowed is that the state laws follow in detail the regulations provided in Titles III and IX of the federal act and that upon such conformity the Board shall certify that the state laws fully comply with the requirements of the federal act. Under Title III grants of federal funds to the several states are based upon:

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[1]The first reports called for by the Alabama Commission, copies of which are attached as Exhibits E, E1 to E10 inclusive (R. pages 59 to 154 inclusive) are prophetic of the annoyance and expense that employers may expect to be subjected to. These first reports are required by the commission not only from employers subject to the act, but from every employer in the state "having in his employment one or more" (Exhibit E, R. 59).

(1) The population of the state.

(2) The estimated number of persons in the state covered by the state unemployment compensation laws.

(3) *Such other factors as the board finds relevant.*

It is therefore evident that the Congress has attempted to use *both the spending power and the taxing power to coerce or purchase the several states into enacting state laws providing for the payment of unemployment compensation according to the pattern prescribed by the federal act.* In order for this Court to approve the federal act as the legitimate exercise of two separate powers, to wit, the spending power and the taxing power of the Federal Government, it is necessary for this Court to close its eyes and shut its mind not only to the detailed regulation prescribed by the federal act but also to pretend ignorance of that which all others know and understand; the real purpose of the federal act was and is to establish a federally controlled system of state unemployment compensation laws. As was said by Mr. Justice Roberts in the case of *United States v. Butler, supra,* with reference to the processing tax levied by the Agricultural Adjustment Act,

> "The exaction cannot be wrested out of its setting, denominated an excise for raising revenue and legalized by ignoring its purpose as a mere instrumentality for bringing about a desired end. To do this would be to shut our eyes to what all others than we can see and understand. Child Labor Tax Case (*Bailey v. Drexel Furniture Co.*, 259 U. S. 20, 66 L. Ed. 817)."

Where a purported tax statute carries with it a detailed regulation of a subject pertaining to which the tax is levied, the tax is not a true tax but a regulatory statute.

Hill v. Wallace, 259 U. S. 44, 66 L. Ed. 822;
Bailey v. Drexel Furniture Co., 259 U. S. 20, 66 L. Ed. 817;
Carter v. Carter Coal Co., 80 L. Ed. (Adv. Opin.) 749.

The tax and fine in *Constantine's Case*, 296 U. S. 287, was held to be invalidly imposed as an effort to add process to the enforcement of state laws, yet it was in the form of tax that went into the general treasury. It is not the use made of the tax itself, as in the case of *United States vs. Butler, supra*, but the device of tax plus credit which condemned the tax in the Guffey Act Case and in Constantine's case. As to the invalidity of Section 3 of the Guffey Act, covering the tax and credit, the Chief Justice affirmatively agreed with the majority, and there was no dissent upon that point. The lower court had rejected the tax and credit provisions as invalid, but upheld the remainder of the act, and the Justices who dissented from annulment of the price provisions because inseparable were for affirmance of the lower court's annulment of the tax section. On that vital point the conclusion of the Justices was unanimous.

The Municipal Bankruptcy Act, voided in *Ashton vs. Cameron County Water Improvement District No.* 1, 298 U. S. 513, 80 L. Ed. 1309, May 25, 1936, is an illuminating decision in its assertion that the state may not destroy the division between states and federal responsibility even by consent, a pregnant circumstance in view of the abject subservience of the state act to the federal requirements.

See also Knickerbocker Ice Co. vs Stewart, 253 U. S., 149.

In the Child Labor Tax Case, *Bailey v. Drexel Furniture Company, supra*, this Court said:

> "Grant the validity of this law, and all that Congress would need to do hereafter, in seeking to take over to its control any one of the great number of subjects of public interest, jurisdiction of which the states have never parted with, and which are reserved to them by the Tenth Amendment, would be to enact a detailed measure of complete regulation of the subject, and enforce it by a so-called tax upon departures from it. To give such magic to the word 'tax' would be to break down all constitutional limitation of the powers of Congress, and completely wipe out the sovereignty of the states."

In the Child Labor Tax Case, Congress attempted to impose a tax amounting to 10 per cent, of the net profits for the year upon any industry which permitted a child under 14 years of age to work in its factory.

In drawing an analogy between that statute and a previous statute enacted by Congress whereby it attempted to prohibit the transportation in interstate commerce of goods made at a factory in which such children were employed, and which was held to be invalid in the case of Hammer v. Dagenhart, 247 U. S. 251, 62 L. Ed. 1101, the Court said:

> "The analogy of the Dagenhart Case is clear. The congressional power over interstate commerce is, within its proper scope, just as complete and unlimited as the congressional power to tax; and the legislative motive in its exercise is just as free from judicial suspicion and inquiry. Yet when Congress threatened to stop interstate commerce in ordinary and necessary commodities, unobjectionable as subjects of transportation, and to deny the same to the people of a state in order to coerce them into compliance with Congress' regulation of state concerns, *the court said this was not in fact regulation of interstate commerce, but rather that of state concern and was invalid.* So here the so-called tax is

a penalty to coerce people of a state to act as Congress wishes them to act in respect of a matter completely the business of the state government under the Federal Constitution. This case requires, as did the Dagenhart case, the application of the principle announced by Chief Justice Marshall in McCulloch v. Maryland, 4 Wheat, 316, 423, 4 L. Ed. 579, 605, in a much quoted passage:

> 'Should Congress, in the execution of its powers adopt measures which are prohibited by the Constitution, or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land.' "

In the case of *United States v. Butler, supra,* the Court, after holding that Congress could not use the taxing power to force compliance with matters of state concern over which the Federal Government had no authority, held that such taxing power could not be used to raise money necessary to purchase a compliance which the Congress was powerless to command. The Court said:

> "An appropriation to be expended by the United States under contracts calling for a violation of a state law clearly would offend the Constitution. *Is a statute less objectionable which authorizes expenditure of federal moneys to induce action in a field in which the United States has no power to intermeddle?* The Congress cannot invade state jurisdiction to compel individual action; no more can it purchase such action. * * *
>
> "Congress has no power to enforce its commands on the farmer to the end sought by the Agricultural

> Adjustment Act. *It must follow that it may not indirectly accomplish those ends by taxing and spending to purchase compliance.* * * * If, in lieu of compulsory regulation of subjects within the states' reserved jurisdiction, which is prohibited, the Congress could invoke the taxing and spending power as a means to accomplish the same end, clause 1 of Section 8 of Article I would become the instrument for total subversion of the governmental powers reserved to the individual states."

In the case of *Carter v. Carter Coal Co., supra*, this Court held the Guffey Coal Act unconstitutional on the ground that it was an attempt on the part of Congress to regulate the mining of coal within the several states which under the Tenth Amendment was a matter reserved entirely to the states, and that the imposition of an excise tax of 15 per cent. on the sale price of the coal with a draw-back allowance of 13½ per cent. where the provision of the act were complied with, was not a legitimate exercise of the taxing power but was a penalty imposed for the purpose of compelling producers to enter into an agreement prescribed by Congress. The court said:

> "It is very clear that the 'excise tax' is not imposed for revenue but exacted as a penalty to compel compliance with the regulatory provisions of the Act. The whole purpose of the exaction is to coerce what is called an agreement—which of course, it is not, for it lacks the essential element of consent. One who does a thing in order to avoid a monetary penalty does not agree; he yields to compulsion precisely the same as though he did so to avoid a term in jail."

There is no difference between exerting pressure to compel compliance on the part of the individuals resid-

ing within the several states and in exerting pressure on the several states to enact laws conformable to the will of Congress.

Appellants suggest that the federal act can be rescued from the scope of the cases cited above and many similar decision upon the ground that the Congress cannot coerce or purchase individual action and upon the further ground that there is no contract here involved. Appellants further contend that this court should not perceive that the moneys raised by the federal act are for the purposes of that act, and also that under the doctrine of the cases of *Florida vs. Mellon*, 273 U. S. 12, *Massachusetts vs. Mellon*, 262 U. S. 447, a state cannot challenge congressional coercion or purchase in a field forbidden the Congress.

Each of these contentions is answered in the very language of the case of *United States vs. Butler*. The holding of this case is not that Congress is forbidden to coerce or purchase action from an individual within a field inhibited to Congress, but that it is forbidden to coerce or purchase such action from any one. There is no limitation of the doctrine of coercion or of purchase from individuals. The holding is summed up with absolute precision in head-note 19:

> "The taxing power may not be employed to raise money to purchase or to enforce by economic pressure a compliance with a congressional regulation of a matter with respect to which Congress has no authority."

Surely an argument carries its own refutation when it asserts that the Congress may not coerce or purchase submission from an individual, who of course has no sovereignty, but may coerce or purchase from a state, thereby not only invading a field outside the congres-

sional orbit, but derogating the sovereignty of the state itself.

The argument that the Congress may purchase or coerce so long as there is no contract is equally in the teeth of the decision and the principle upon which it rests. What is forbidden is purchase or coercion; not merely purchase or coercion accomplished through the instrumentality of a contract. It makes no difference what the instrumentality, the purchase or coercion is absolutely forbidden. Even if the principle were limited to purchase or coercion accomplished through contract, defendant would stand on no better ground. Appellants contention overlooks the elementary principle that an offer to pay a sum of money provided another person does a certain act ripens into a contract when the act is done.

The contention that the court must shut its eyes to the fact that the moneys raised by the federal act will necessarily be used for the purposes of the act is of course utterly defective. Here is an act which raises forty-seven billion dollars and provides certain old-age and unemployment benefits amounting to forty-seven billion dollars. The money is raised from payrolls and the states which are made the disbursing agents are required under the credit device to levy the exactions upon payrolls—the employer being forbidded to reimburse himself by decrease in wages. The only moneys disbursed are those raised from payrolls and the only moneys raised by the federal act are those exacted from payrolls. The court judicially knows that all general revenues of the United States are requisitioned and overrequisitioned for the general support of the government. The court judicially knows that without the revenues provided by the federal act the payment of the behefits therein ordained would be utterly impossible. It

is not a question of some power, technical or otherwise, to use the revenues provided in the federal act for purposes other than those of the act. The revenues raised by this act are *indispensable* to the carrying out of the act. Being a necessary step in the illegal scheme of purchasing and/or coercing submission in a forbidden field, the tax is as illegal as the appropriation which carries out the scheme. The holding of the case of *United States vs. Butler, supra,* is thus summarized in head-note 18:

> "While the power of taxation may be adopted as the means to carry into operation another power also expressly granted, *resort to the taxing power, to effectuate an end which is not within the scope of the Constitution is inadmissible.*"

The fact that in the federal act the tax is set forth under a separate title from the appropriation is of course of no moment. In the case of *United States vs. Butler, supra,* the court indicates its view of such contention by using the language "passing the *novel* suggestion that two statutes enacted as parts of a single scheme should be tested as if they were distinct and unrelated."

Surely no one would be naive enough to suppose that the draftsmen of the Agricultural Adjustment Act could have saved it from unconstitutionality by the expedient of numbering paragraphs separately.

The Mellon cases are of course in no way in point. In the Florida case the Congress simply provided in substance that where a state taxed inheritances the Congress would not duplicate this tax. Had the act of the Congress provided that, in order to obtain the credit, a state must adopt a rule of descents and distributions prescribed by the Congress, the act of course would have been clearly unconstitutional under the principles of the case of *United States vs. Butler.*

In the Florida case the court merely held that the state had no justiciable cause of action. It was not urged that the credit had coercive effect upon Florida, nor had been adopted by the federal government for any such objective, nor was in fact proximately related to that end. The court held that the probable withdrawal of citizens from Florida was speculative and remote. Moreover, since the federal inheritance tax was a tax levied unmistakably for general treasury purposes, it is obvious that the right to levy such tax took precedence over any conflicting policy of the state, and the court so held.

It may be difficult at times to determine whether a tax or a credit is levied to effect and with the direct proximate result of effecting an unconstitutional purpose, as in the Child Labor Tax Case, or is levied apparently or at least ostensibly for revenue as in the McCray and Doremus cases. The court has divided in the past and will divide in the future as to this test.

It is sufficient here to assert that the inheritance tax has been employed traditionally as a source of revenue, produced substantial revenue both for states and nation and that the credit was in fact urged by the states in an increasing bona fide desire to avoid onerous duplicate taxation on the same items, transactions or property: a desire in which this Court has evidenced an aroused and constructive interest.[1]

The difference between that honest comity and the "device" of a tax upon payrolls for the purpose of establishing a uniform system of federal controlled state compensation insurance, accompanied by credit to force states to adopt a federal "certified" system of compensation, is obvious.

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[1] Farmers Loan and Trust Co. vs. Minnesota, 280 U. S. 204, overruling the constructive situs case of Blackstone vs. Miller, 188 U. S. 189.

In the Massachusetts-Frothingham cases, supra, the decisions dealt *solely* with remedy. Says the court:

> "We have reached the conclusion that the cases must be disposed of for want of jurisdiction, without considering the merits of the constitutional questions."

In pursuance of this conclusion, the court then pointed out that an individual litigant not taxed by the act in question could not raise the issue of the power of Congress to tax and appropriate because the interest of the individual in the moneys of the treasury was minute and indeterminable. The court then held that the state was equally without standing to invoke court action, no matter how unconstitutional might be the act of Congress.

It might be observed also that in the Massachusetts-Frothingham cases the amount was not—as it was in the processing tax and social security statutes—sufficient to exert any pressure. Massachusetts' share of the entire appropriation involved in the Mellon case was only a few thousand dollars a year.

INTERFERENCE WITH EMPLOYEE RELATIONSHIP

Sections 303(a), 903(5) of the federal act when placed side by side with sections 10(g), (i), 4(d), 6 of the state act demonstrate beyond question federal interference with the local activity of employer-employe relationship.

As a matter of fact, attempting under federal law to require an employer to pay to his employe while unemployed a fixed sum, is essentially a compulsory wage contract. To say that a local manufacturer must pay his unemployed workmen a minimum wage or pension

while not at work, is not in any sense different in its principle from saying that he must pay him a minimum wage while at work. Both fall within the interdiction of the Constitution which prohibits the federal government from taking charge of the domestic and internal affairs of the state. Moreover, neither the federal nor the state government can require an employer to pay prescribed wages. This is an invasion of liberty of contract and repugnant to the due-process clause of the Fifth and Fourteenth Amendments.

In *Morehead v. Tipaldo*, 80 Law. Ed. (Adv. O.) 921, reaffirming the doctrine of *Atkins v. Children's Hospital*, 261 U. S. 525, the Supreme Court held that it was beyond the power of a state to require the payment of a minimum wage. The holding is succinctly stated in the headnote as follows:

> "A statute which provides for the fixing of minimum wage rates for adult women employes is repugnant to the constitutional requirement of due process of law."

Says the Court in the opinion:

> "It amounts to a compulsory exaction for the support of a partially indigent person for whose condition there rests upon the employer no peculiar responsibility. * * *
>
> "The ethical right of every worker, man or woman, to have a living wage may be conceded. The fallacy of the proposed methods of attaing it is that it assumes that every employer is bound at all events to furnish it.".

In the present instance what have we in the ultimate analysis but a compulsory exaction against the employer of labor to provide wages for employes while idle? If neither the state nor the general government can require

the payment of stipulated wages to employes while they are working, a fortiori, neither state nor national government can require the payment of such wages to a workman while unemployed.

The federal act, when analyzed, takes over the regulation of industry in a manner and to an extent that has never before been attempted in the history of our country. Among other things it:

(a) Imposes a tax upon employers only.

(b) Forces into the state act its "must provisions" over employe relationships.

(c) Regulates the amount that the employe is to receive under his contracts for wages by compelling the employer to make a deduction from the employe's pay.

(d) Compels the employer to keep a thumbnail-fingerprint record of all his employes and make the same public, not only to the Board, but to other federal agencies.

(e) Requires the keeping of voluminous records by the employer in reference to his employes and the making of various reports to the Commission and to his own employes.

(f) Imposes a compulsory compensation insurance plan on all employes.

(g) Regiments industry upon a scale never before attempted by imposing upon employers and non-union employes the closed shop, and collective bargaining, as defined by the various boards acting under the discredited and deceased NRA and Guffey Acts.

(h) Enters into the insurance business on the largest scale ever attempted in the world's history. (While the insurance business may be regulated because affected with a public interest even this power of regulation exists in the state and not in the national government. *Northwestern National Life Insurance Company v. Paul Riggs*, 203 U. S. 243).

The paramount purpose of the federal act to control the states in matters of purely local concern is abundantly illustrated by its title. It states that it is:

> "An Act, To provide for the general welfare by establishing a system of Federal old-age benefits, and by enabling the several States to make more adequate provision for aged persons, blind persons, dependent and crippled children, maternal and child welfare, public health and the administration of their unemployment compensation laws; to establish a Social Security Board; to raise revenue; and for other purposes."

Every subject matter involved in this definition relates to matters within the exclusive field of state regulation. Since time immemorial the states have been accustomed to regulating matters relating to industrial relief, to provide against indigency and to control relief agencies. Statutes of every state now contain, and have at all times contained, laws relating to these subjects, which have never been disputed or questioned as being improper or without the sphere of state legislation. It is for the state to determine, free of National compulsion, the manner and means of controlling these local affairs. This right is clearly expressed in the following quotation from the case of *House v. Mayes,* 219 U. S. 281:

> "* * * that while the Constitution of the United States and the laws enacted in pursuance thereof, together with any treaties made under the authority of the United States, constitute the supreme law of the land, a State of the Union may exercise all such governmental authority as is consistent with its own Constitution, and not in conflict with the Federal Constitution; that such a power in the State, generally referred to as its police power, is not granted or derived from the Federal Constitution, but ex-

ists independently of it, by reason of its never having been surrendered by the State to the general government; that among the powers of the State, not surrendered,—which power therefore remains with the State,—is the power to so regulate the relative rights and duties of all within its jurisdiction as to guard *the public morals, the public safety,* and *the public health,* as well as to promote the public convenience and the common good; and that it is with the State to devise the means to be employed to such ends, taking care always that the means devised do not go beyond the necessities of the case, have some real or substantial relation to the objects to be accomplished, and are not inconsistent with its own Constitution or the Constitution of the United States. The cases which sanction these principles are numerous, are well known to the profession, and need not be here cited."

In view of the decisions of the Supreme Court cited herein, it is unnecessary to cite the many other federal decisions holding that the objects sought to be regulated by the federal act are all within the exclusive field of the State Legislature and that Congress cannot trespass thereon on the specious theory that state relief, state unemployment, state social assistance, state employe relationship, affect the Nation's welfare. **It cannot be successfully asserted that regulation of these matters has ever been sustained as being within the field of congressional power.**

Coercion and Purchase of State Submission Not Only an Object of the Statute But the Sole Object.

The inevitable intent and the inevitable effect of this statute is to institute a system of governmentally insured idleness pensions throughout the United States. The taxing power of Congress is exerted to that sole end. *Federal* general welfare is not involved. The fact that

Congress adopted the circuitous device of state action, bought with federal funds, is an absolute admission of this.

The heart and purpose of the act is admittedly social, to break the distress of unemployment, to sustain purchasing power during unemployment periods. We venture the assertion that no one would have the audacity to state that its purpose is to benefit employers rather than the general public.

While in this case this court has been relieved of the difficulty of determining the dominant purposes of the federal act, by the unanimous and repeated declarations of the legislative and executive agencies concerned in its enactment, and of the federal authorities currently interpreting and administering it, there are mechanical tests which further relieve the Court of any alternative conclusion.

Thus, if no state should have established or should establish an agency to administer the scheme and all employers everywhere should, accordingly, pay the tax, is it not obvious that, notwithstanding the very substantial revenue involved, the whole purpose of Titles III and IX would be defeated?

In short, the proclaimed objective of the statute would succeed only to the extent a credit against the federal tax is obtained. A scheme which succeeds only as revenue is not derived cannot honestly be characterized as a general revenue measure.

Again, as recording the local and non-national characteristics of the scheme, is it not obvious that the tax to be paid by the employers, in those states which have not established an agency for the congressional purpose of unemployment compensation, in no sense of the word supplements the national purpose for a compensation system? Funds paid into the federal treasury from Ohio

constitute in no respect a national equivalent of a federal-state unemployment compensation scheme in Alabama. Hence the alternate basis of the tax and credit, i.e., tax or a local system of unemployment compensation, is on its face preposterously inconsistent as a revenue measure. The credit alternative has no relation to any principle of federal revenue. The decision of the court in the *Linder Case* is conclusive here. The court had sustained, with grave hesitation, subsequently reasserted, the narcotic tax as a revenue measure. The legislative footprints and fingerprints and plain indicia of regulation were lacking. But Congress later on (40 Stat. 1057, 1130) added a regulation which had no rational relation to the discovery or collection of revenue and was obviously intended as a regulation of the use of opiates. This could not be sustained. Having sustained the act as originally enacted solely on the basis of revenue, the added provision looking to regulation could not be sustained. Had the purely regulatory aspects been incorporated in the original act, the act would not have been upheld. *Linder vs. United States*, 268 U. S. 5, is of vital bearing here. So, in Title IX we have the flagrant repudiation of an intent to produce revenue by the allowance of the credit both for taxes paid into a state agency of regulation as well as for good conduct unaccompanied by any payment of taxes (Section 909 of Title IX).

Section 909 of Title IX is, of itself alone, a complete and unanswerable acknowledgment that taxation is not the objective of the act, in that it provides for a credit against the federal tax based upon "good conduct" of an employer under the state unit of the "federal-state system". That provision, like the narcotic regulation in *Linder vs. United States*, has no rational place in a sys-

tem of taxation. It is appropriate to an unemployment insurance system.

We cannot better express the contention that we are now making than to give a summary of the statements made by Mr. James A. Emery, attorney of the National Association of Manufacturers before the House Committee on Ways and Means when the Federal Act was under consideration.

Mr. Emery felt that upon a serious examination it would be found that the proposed tax is not a tax at all; it does not give a legal basis for a tax, and that there are very serious objections to an exercise of congressional power of this character for this purpose. (Hearing before Committee on Ways and Means of the House on H. R. 4120, pp. 1020.)

Mr. Emery discussed the case of *United States vs. One Ford Coupe Automobile*, 272 U. S. 321 (71 L. Ed. 279), quoting from the court's opinion that the use of the word "tax" did not prove conclusively that the burden imposed is a tax. Such is a matter for judicial determination after the legislature has exercised its discretion. He referred to the *Child Labor Tax Case*, 259 U. S. 20 (66 L. Ed. 817), and *Stafford vs. Wallace*, 258 U. S. 495 (66 L. Ed. 735), and *Hill vs. Wallace*, 259 U. S. 44 (66 L. Ed. 822), as authority for the principle that so-called taxes were not in fact taxes. He distinguished the case of *Florida vs. Mellon*, 273 U. S. 12 (71 L. Ed. 511), in which the court pointed out that:

> "a tax is the compulsory taking of the private property of the citizen for the purpose of the support of the sovereignty or government which levied the tax. That is the test of what constitutes a tax." (Ib. p. 1025)

He said, the difference between the estate tax and the pay roll tax is that in the first instance the credit is not de-

pendent on the adoption by the state of a policy proposed by Congress; in the second place, unless the state puts into effect the unemployment plan with its standards fixed by Congress, the taxpayer receives no credit for the state tax. Congress did not enact the estate tax for the purpose of endeavoring to persuade the states to enact a like tax. Only three states in the Union lacked such a tax (Ib. p. 1026). If by the use of the taxing power an attempt is made to impose a penalty or to compel an independent sovereign or individual to pursue a certain line of conduct, if what is done is the endeavor to exercise a forbidden power under the color of a permissive power, the exercise of the latter cannot be sustained. If the federal tax is intended not to raise revenue but to control the local conditions of production, the tax is invalid. *The purpose of the tax is not to raise revenue for the federal government; for if it were successful in raising revenue the bill would be a failure.* The proposed statute therefore, as it is worded, defeats its own purpose.

> "It would be, in this instance, you gentlemen will clearly admit, a complete failure if it succeeded in raising revenue which the federal government retained, instead of raising revenue which the state recaptured if it conformed to the requirements imposed by the federal government, carrying out the will of Congress, as laid down in legislation. Therefore, I say it is a regulatory statute." (Ib.)

An examination of the legislation piece by piece is convincing that it is upon its face pointed to one result:

> "to secure state legislation upon a subject on which the states have not legislated and which under the tenth amendment is not only under their control but which they are free to accept or reject." (Ib. p. 1027)

And it is here proposed that unless the states act, a tax will be levied upon their citizens which the states cannot recover and which will lessen their taxing power.

> "So, paradoxical as it may seem, the success of this bill depends upon its failure to produce revenue for the federal government." (Ib.)

Mr. Emery, in answer to questions from the committee, stated that in the instance of the estate tax the taxpayer could secure his credit as a result of his own act, while under the present bill no act of the employer could recover his credit, such being dependent entirely upon the act of the state of which he is a citizen (Ib. p. 1027). While the tax (or 10 per cent thereof, dependent on the action of the states) goes into the federal treasury subject to appropriation for any purpose, the major purpose of the bill according to its title is "a bill to alleviate the hazards of old age, unemployment, illness, and dependency, to establish a social insurance board in the Department of Labor, to raise revenue, and for other purposes", while the minor purpose is revenue (Ib. p. 1030).

Had the committee heeded the warnings of Mr. Emery, of Mr. Green, Senator Hastings and others this unconstitutional statute would not have been enacted. We submit the authorities previously cited flatly hold that general welfare means federal welfare, and that similarity of conditions throughout the United States or desirability of uniform action does not present a situation of general welfare within the purview of the federal constitution, but that those matters must be dealt with solely by the states, and Congress cannot constrain the manner of such dealing either by coercion or by purchase, or by a combination of the two.

The language of the opinion in *U. S. v. Butler, supra,*

might well have been penned for the record presented by this case. Says the court:

> "The Government asserts that whatever might be said against the validity of the plan, if compulsory, it is constitutionally sound because the end is accomplished by voluntary co-operation. There are two sufficient answers to the contention. The regulation is not in fact voluntary. The farmer, of course, may refuse to comply, but the price of such refusal is the loss of benefits. The amount offered is intended to be sufficient to exert pressure on him to agree to the proposed regulation."

So here co-operation on the part of the states is not voluntary. In the Agricultural Adjustment Act case the benefits were payments to the farmers for the adoption of a system of crop curtailment. In the instant case the benefits are gigantic sums of money paid for the adoption of a pension system.

The court says:

> "The power to confer or withhold unlimited benefits is the power to coerce or destroy."

So here the power to withhold from the states the 90 per cent credit (which, when supplemented with the contribution by the federal government of administrative expenses, becomes really 100 per cent) is the power to coerce irresistibly. Congress says to Alabama:

> "Keep your own present method of dealing with employment and unemployment and you forfeit ten million dollars a year."

This is not only coercion but coercion on a colossal scale.

The opinion continues:

> "But if the plan were one for purely voluntary co-operation it would stand no better so far as federal power is concerned. At best it is a scheme for purchasing with federal funds submission to federal regulation of a subject reserved to the states."

If, therefore, it were conceded that Congress is not coercing the states to enact the Congressional plan of regulation, it is purchasing such enactment from them and the statute falls for this reason.

The contention of the defenders of the legislation that the tax imposed by Congress to raise these huge sums is a separate matter from the attempted regulation of state policy is answered by the opinion in these words:

> "The statute * * * by its operation shows the exaction laid upon processors to be the means for the intended control of agricultural production."

As was said in the Child Labor Case, if the Congress may, by indirection, exert control over one feature of internal state policy there is no such feature which is free from Congressional shaping. If the federal act is valid, then through precisely the same machinery, the Congress may take control of every field of state policy where a fiscal program is involved. May we illustrate with a few examples:

If the Congress desired to have every state institute a system of governmentally insured workmen's compensation for industrial accidents it need only enact a statute similar to this one, levying a tax sufficient to pay the compensation accruing to workmen accidentally injured, and providing that those states which adopt such a system will receive the money back through a 90 per cent drawback or credit on the federal tax, whereupon the state is to disburse the money as workmen's compensation benefits.

If it is desired to procure from each state the enactment of laws prohibiting the sale of intoxicants, Congress could calculate the amount of liquor taxes which would be lost by the states, levy a national tax of that amount, and offer the states as a drawback the equivalent credit provided they enacted state-wide prohibition laws.

If Congress desired to shape the educational system of the states it could levy a tax equal to the revenues necessary to maintain the schools and offer the appropriate drawback provided the states agree to eliminate parochial schools or agree that the Darwinian theory shall not be taught in any of the schools, or agree that all teachers should or should not be required to join a union.

Illustrations might be multiplied indefinitely. It is submitted that if Congress can exert its taxing power to install unemployment pensions in each state, it can equally exert its taxing power to occupy every field of local domestic concern.

THE FINAL AND CONCLUSIVE ANSWER TO THE CONTENTION OF APPELLANTS IS THAT EVEN IF THERE WERE NO COERCION OR PURCHASE OR PARTY TO COMPLAIN OF THE APPROPRIATION, THE CONGRESS COULD NOT LEVY THIS TAX UNDER THE GENERAL WELFARE CLAUSE.

Even if we did not have here present the element of an attempt to coerce and/or purchase submission to federal regulation outside the orbit of permissible congressional action, the federal act would still fall because not within the authorization of the general welfare clause.

It is a recognized and historically established fact that no body of men were ever more meticulously careful in

their choice of words than were the framers of the Constitution of the United States. The tremendous difference between "The United States of America", and "the inhabitants of the states", was recognized by them in its fullest import. Had they meant to enact a clause conferring upon the Congress power to tax for the benefit of inhabitants or groups of inhabitants of the states, it is, we submit, beyond contestation that they would have used such language instead of employing language which is apt only to designate the political sovereignty they were creating, and which, throughout all other parts of the Constitution, they used solely for the purpose of designating the political corporation they were creating.

It has never been contended even by as ardent latitudinarianists as the Hamiltonians that this clause authorizes Congress to raise money for any and all purposes which may in any way benefit any inhabitants or group of inhabitants of the United States. It is the general welfare of the United States which is involved; and this by all the authorities means general not local, national not state, purpose and benefit.

The fundamental constitutional principle that the power of federal taxation and appropriation may not be exercised for state as distinguished from national purposes has been repeatedly stated by the highest authority. In *Gibbons vs. Ogden*, 22 U. S. (9 Wheat.) 1 (1824), Chief Justice Marshall said at page 199:

> *"Congress is not empowered to tax for those purposes which are within the exclusive province of the states."*

In the Passenger cases, 48 U. S. (7 How.) 283 (1849) at page 446 Mr. Justice Catron said:

> "Nor has Congress power to lay taxes to pay the debts of a state, nor to provide by taxation for its

general welfare. Congress may tax for the treasury of the Union, and here its power ends."

If Congress has no power to lay taxes to pay the debts of a state after they are contracted, it equally follows that Congress has no power to lay taxes to enable the state to perform state functions by paying cash instead of creating debts.

Judge Cooley at page 108 of *Cooley on Taxation* says:

> *"State expenses are not to be provided for by federal taxation."*

Justice Samuel F. Miller says at page 247 of his *Lectures on the Constitution*:

> "The United States being a limited form of government, one of the restrictions to which it is subject is in regard to its power to levy taxes. The states may levy them for *a great many purposes for which Congress cannot,* because to the states belong all the powers not delegated to Congress."
>
> "Congress may levy and collect taxes for *legitimate purposes of the national government, but not for the purposes of state governments."*
>
> *Cloud, etc. vs. Coleman, etc.*, 64 Ky. 548, 588 (1866)

Moreover, the public purpose which will sustain a tax or appropriation must *be a public purpose of or from the standpoint of the taxing government.* That it may be a public purpose of or for another government is insufficient; and what may be a public purpose for one taxing government may not be a public purpose for another taxing government. *Cooley on Taxation* 108; *Hubbard vs. Fitzsimmons,* 57 Ohio State, 436; *State ex rel Owen, Attorney General vs. Donald,* 160 Wis. 21, 151 N.W. 365.

To constitute a public purpose of the federal government, therefore, it is necessary that the purpose be a national public purpose and it is not sufficient that the purpose may be a public purpose from the standpoint of a state or a municipality. *Kohl vs. United States*, 91 U. S. 367.

It should be noted that the language of the welfare clause itself very carefully limited the taxing power by stating its purpose to be "to pay the debts and provide for the common defense and general welfare *of the United States.*"

Of course the court will note the very significant import of the words "of the United States" in this clause, as meaning, not the states which compose the United States, nor the people who inhabit the United States, but the entity erected by the Constitution—namely, the government thereby established, and which we mean when we speak of the President of the United States, the Congress of the United States, and the courts of the United States.

The meaning of the general welfare clause under the Hamiltonian theory, as expounded by Mr. Justice Story, is that it does not embrace all things whatsoever under the power of raising and expending taxes, but only those which come within the term "of the United States" as a sovereign government. Mr. Justice Story of course meant just this when he said:

> "A power to lay taxes for the common defence and general welfare of the United States is not in common sense a general power. It is limited to those objects. It cannot constitutionally transcend them." (Sec. 922)

In a lecture given by Mr. George Tichnor Curtis before the Law School of Georgetown University on Feb-

ruary 16th, 1885, he develops this idea so clearly and forcibly that we quote him at length:

> "We hear much nowadays about the so-called 'general welfare clause' of the Constitution. The Constitution uses the words general welfare in just two places, and no more. In the preamble the promotion of the general welfare is one of the objects enumerated, along with five others, for which the people of the United States ordain and establish the Constitution. The wildest and most latitudinarian constructionist would hardly venture to tell an audience of intelligent law students that the preamble of the Constitution contains any grant of power. It simply asserts the grand objects which the people aim to secure by the Constitution; but as to the means by which they do secure these desirable objects we must look into the body of the Constitution and among its enumerated powers. Looking into the body of the instrument we come upon the first clause of the 8th section of article 1 of the Constitution, which contains the grant of the taxing power. Here the words general welfare are used again; and, strange to say, there are persons who suppose that this clause contains a grant of authority to tax in order to promote the personal welfare of every man, woman and child in the United States! I shall merely counsel you to analyze the clause and see how strange this notion is. The clause grants to the Congress a power to tax the people for three special purposes: First, to pay the debts of the United States; second, to provide for the common defense of the United States; third, to provide for the general welfare of the United States. In every one of these special purposes for which the taxing power is to be exercised; 'the United States' means the political corporation known as the United States, and not the individual inhabitants of the country. The debts that are to be paid are the debts of the Government; the common defense that is to be pro-

vided for is the defense of the Government in all those matters in which it has duties of defense to discharge for the whole country; the general welfare that is to be provided for is the well being of the Government in all those matters of which it has special cognizance, and in respect to which its efficiency concerns the whole Union. * * * In the very next clause, which contains the grant of power to borrow money on the credit of the United States, the 'United States' is used in the same sense, meaning the government known as the United States. It is on the credit of the government, not on the credit of individuals or of states, that Congress is authorized to borrow money.

"Now look at the stupendous communism that is wrapped up in the taxing power, on the supposition that it includes a power to tax for the promotion of the welfare of the individuals. There is no limit to the taxing power, excepting that duties, imposts and excises must be uniform throughout the United States. All the property in the country may be taxed without limit for the legitimate objects of taxation. If one of those legitimate objects is the welfare of individuals, or masses, or classes, or of the whole people, the two Houses of Congress and any President acting together can divide up all the property in the country upon the plea that a general division will promote the general welfare. By this process this Government could devour itself, and there would be nothing left for it to subsist upon. But it happens that one of the grand purpposes for which this government was established was the protection of the property, and its Constitution contains guarantees designed for the protection of property that are more remarkable and efficient than any that exist under most of the other governments in the world. At the same time the Constitution contains guarantees of personal rights that are as strong and efficient as those afforded to the rights of property."

Followed to its logical conclusion, the contention that Congress can tax for the purpose of providing old-age, unemployment and indigent relief results in a perfect *reductio ad absurdum*. All powers possessed by the federal government under the Constitution are of course paramount since the federal government is supreme in its own sphere. "The government of the Union, though limited in its powers, is supreme within its sphere of action." *Mondou vs. New York Ry. Co.*, 223 U. S. 1, 51, *McCullough vs. Maryland* (4 Wheat.) 316; *Minnesota Rate Cases*, 230 U. S. 352, 396. "The power conferred upon the Congress is such that when exercised it excludes and supersedes state legislation." *Gilvary vs. Cuyahoga* R. Co., 292 U. S. 57, 60. Wherever Congress is empowered to occupy any field it is empowered to occupy that field to the exclusion of all state action. In such field the state can act only when Congress has failed to occupy the field or has granted the state permission to occupy as a tolerated privilege—a tenancy at the will of Congress. Therefore, if Congress has power to provide for unemployment, old-age and indigent relief, it has power to exclude any state from doing so. If it be contended that Congress has power under the welfare clause to provide such relief, this carries the absurd further contention that the only reason the states through all these years have been allowed to deal with these matters is that Congress has permitted their doing so as an act of tolerance by not asserting its right to occupy the field to the exclusion of all state action.

Proposition IV.

THE FEDERAL ACT IS INVALID BECAUSE IT CONTAINS AN ILLEGAL DELEGATION OF LEGISLATIVE AND JUDICIAL POWERS TO THE FEDERAL SOCIAL SECURITY BOARD.

Panama Refining Company vs. Ryan, et al, 293 U. S. 388;
A. L. A. Schechter Poultry Corporation vs. United States, 295 U. S. 495.

The analysis which we have previously made in this brief of the federal act demonstrates the plenary powers given the Board. From its decisions there are no appeals. Among the powers conferred upon the Board, legislative or judicial in character, and with no appropriate standard or yardstick, may be mentioned the following:

The Board is given the power to determine the amounts of appropriation of the states in the administration of their unemployment compensation laws. It not only has authority to make these appropriations contingent upon the Board's estimates of the number of persons who are to receive aid, without any policy or standard to determine how these estimates shall be arrived at, but destroys this hint of a standard by authorizing the Board to base its conclusions on *"such other factors as the Board finds relevant"*. It, therefore, appears that Alabama having in reliance on federal aid repealed all appropriations for administrative purposes will have to depend entirely on the Board's discretion which is free from any legislative guides or determinations in its exercise. It is needless to point out that while the act makes a blanket appropriation the legislative function of appropriating any money to a particular state does not take place until the Board has exercised its function of determining as to whether or not the state shall be allowed to requisition the fund.

The Board is given the power to determine whether the state unemployment law shall be approved and to determine the rates of taxes payable by employers to different states. Note that the Board must approve the law if (among other things) it provides for compensation to be paid through public unemployment offices in

the state, *or state agencies as the Board may approve.* The words emphasized wholly nullify the effect of the words immediately preceding them, and commit all control to the Board's discretion. The Board may not only determine which state laws it will approve, but it may also regulate the rates of taxes in different states by its action in approving or failing to approve the state laws. Thus, by failing to approve a state unemployment compensation law imposing a specific tax the Board has it within its power to add a penalty upon the employers of the state to the extent of the tax imposed under the state law, as well as the tax which is imposed upon all employers in states which do not have an approved federal law. Otherwise stated, the employer, at the discretion of the Board, may be compelled to pay two taxes under two laws, although the scheme of the legislation was designed to overlap and make the rate of taxes uniform throughout the country.

The Board is given the absolute power to adjust the rate of taxes. Under Section 909(a) additional credits are allowed against federal taxes to taxpayers under state laws who have complied with certain conditions set forth in Section 910. These additional allowances are permitted, however, only if the Board finds under the state law a lower rate allowed to the employer was permitted in certain circumstances. No standard or rule of conduct is set up for the purpose of ascertaining these circumstances. The Board, therefore, has an uncontrolled discretion of adjusting the rate of taxes.

The Board is given the absolute power to prescribe such methods of administration as the Board finds "to be reasonably calculated to insure full payment of unemployment compensation when due", and "to designate the agencies through whom payments of benefits must be made."

Upon the Board is conferred not only the legislative power, but the judicial power of determining when the state agency, charged with the administration of the state law, has denied "in a substantial number of cases unemployment compensation to individuals entitled thereto under such law, or has failed to comply substantially with any of the provisions of the federal law", and as to whether or not the state "has, with respect to the taxable year, failed to comply substantially with the provisions of the federal law".

Part II.

THE EXACTIONS IMPOSED ON EMPLOYERS BY SECTION 4(a), (b), (c) and (d) OF THE STATE ACT ARE IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Proposition I.

SECTION 4(a), (b) and (c) OF THE STATE ACT IS IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES BECAUSE IT TAKES PRIVATE PROPERTY FROM ONE CLASS FOR THE USE OF ANOTHER; ITS PURPOSE IS NOT A PUBLIC PURPOSE, IN THE SENSE IN WHICH THE WORDS "PUBLIC PURPOSE" ARE USED AS JUSTIFYING THE TAKING OF PRIVATE PROPERTY WITHOUT JUST COMPENSATION.

The Supreme Court of Alabama, in the case of *Beeland Wholesale Company vs. Jacob L. Kaufman, as Chairman, et al.* No. 198, has decided that the state act is in keeping with the Alabama Constitution. While the certificate of affirmance in this case has been with-

drawn pending the consideration of appellant's application for rehearing, we do not question this decision insofar as it relates to the asserted violations by the state act of the state constitution. We insist, however, that the state act is palpably invalid under the Fourteenth Amendment to the Constitution of the United States.

As a text for our argument in support of proposition I above, we select the following statement of Mr. Justice Holmes in *Pennsylvania Coal Company v. Mahon*, 260 U. S., at p. 416:

> "In general it is not plain that a man's misfortunes or necessities will justify his shifting the damages to his neighbor's shoulders. * * * We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

The state act imposes exactions upon both employers and employes. Whether these exactions are in fact taxes or contributions, they are illegal because they are not levied for a public purpose.

As was said by Mr. Justice Roberts in the case of *United States v. Butler*, 297 U. S. 1, 80 L. Ed. 287:

> "A tax, in the general understanding of the term, and as used in the constitution, signifies an exaction for the support of the government. The word has never been thought to connote the expropriation of money from one group for the benefit of another."

As the payments to unemployed persons under the state act do not depend on the destitution of the recipients, they are not for a public purpose under the recognized duty of the state and local subdivisions to care for the destitute.

The contention of the defenders of the state act is that large numbers of the population of Alabama do not enjoy permanent employment; that in times of unemployment their purchase and consumption of goods and services decline and therefore it is of public interest to have such persons provided with an income so that they may continue for a time their consumption of goods and services. As a reason for this bounty the act in effect declares the inability of the state to suddenly take care of such large numbers of unemployed and therefore it proposes to have employers and employes contribute to a fund from which such benefits may be paid.

If we concede, which we do not, that such funds so contributed are public funds and that the legislature has the same right to dispose of them that it has to dispose of money raised by general taxation, the legislature has no right to pay out public money for private benefit. We concede the right of the state to care for the destitute, but public funds may not be used for the care of those who are not destitute. The state act makes no distinction. There is no difference between paying benefits generally to unemployed persons and making loans to farmers whose crops have been destroyed by drouth that they might provide themselves with seed for planting crops, or paying bounties to those who plant trees or raise sugar beets, or making gifts to manufacturing enterprises which establish themselves in the locality and thereby provide employment, all of which have been held invalid.

While the class to whom the benefits are to be paid is new and the attempt to place the burden on the two groups, employers and employes, is novel, the legal principles are ancient, have been tried time and again and have always been rejected by the courts as an illegal use of the taxing power.

In 1875 the legislature of Kansas sought to authorize townships to issue bonds to make loans to farmers for the purchase of grain for seed and feed. The validity of the act was challenged in the case of *State v. Township of Osawkee,* 14 Kan. 418 (2d Ed.) 322. Judge Brewer, who later became a justice of the Supreme Court of the United States, held the act invalid. Because of the eminence of this authority and the force of his reasoning we respectfully refer the Court to the opinion and take the liberty to quote a portion from it.

> "The credit of the township is invoked to procure funds for the accommodation of a single class temporarily, and through unexpected calamity, embarrassed in the prosecution of its ordinary business. Can this be called a public purpose? Clearly not. It would doubtless relieve the temporary wants of that class, would enable it to enter upon the business of the year with increased hope, and a reasonable expectation of ordinary success in that business, and thus indirectly result in great benefit to the general public. But a similar result would follow the success and prosperity of any other class in business. And if the principle be once recognized in its application to this class, who can tell how soon it may be invoked in aid of another? If one hundred farmers may receive seventy-five dollars each to assist them in farming, why may not one hundred mechanics with equal propriety receive seventy-five dollars each to assist them in their business? Or a single manufacturer, who employs one hundred hands, receive seventy-five hundred dollars to assist him in his manufacturing? A difference in amount makes no difference in the principle.
>
> "But it may be said that this legislation can be defended as preventive and anticipatory. To prevent the spread of disease, quarantine regulations are enforced, and ships coming from certain places are, with all their passengers, detained in quarantine,

even when not a solitary case of sickness exists on board. To prevent ignorance in the voter, the child is compelled to be educated. To prevent crime in the man, the boy is sent to the reform school. To prevent the spread of fire valuable buildings are pulled down and destroyed. Grant that these parties are not now helpless and dependent; that they are not a public charge. Unless they are able to make and harvest a crop they may become so the ensuing winter. Is it not the part of wisdom to expend a little now to purchase seed and feed, rather than run the risk of having them become paupers hereafter? Under the peculiar circumstances of this case, this argument is a strong one. We are not disposed to belittle the magnitude of the calamity, or make light of the hardships of those upon whom it has principally fallen. If we consulted simply our own feelings, we should gladly approve of this as of every effort to mitigate the severity of the blow. But though this calamity is great, and though by reason thereof it may seem wise to appropriate out of the public funds a little now to guard against the risk of future want, yet the principle is dangerous and unsound. Let the doorways of taxation be opened, not merely to the relief of present and actual distress, but in anticipation of and to guard against future want, and who can declare the result? How certain must be the expectation of want? How nigh its approach? What efforts must the individual make to ward it off? May he do nothing, and demand that the public make provision to guard against the possibility of future suffering? Must widespread and general calamity precede the granting of such anticipatory relief, or is it enough that individual misfortune or indolence render probable the approach of want? The mere mention of these questions suggests the dangers which would follow the adoption of this as a rule of public conduct.

"But the attendant dangers of such a rule are not the sole or the controlling considerations. The re-

lief provided in this act is only indirect, and contingent. There is no direct appropriation to meet future want. The appropriation is for present use, and the relief is contingent on the successful prosecution of the business of the recipients during the ensuing year. If the crop proves a failure, the public funds are lost, and no relief is secured. It is a speculation, which, however proper and reasonable for individuals, is not a legitimate part of public duty. The same principle would justify assistance to a mechanic destitute of tools, to enable him to purchase tools, and through their use in his regular calling prevent his becoming a public burden. Indeed, it would be difficult to deny its application in any case where, by present assistance, either in the purchase of implements or stock in trade, the recipient might reasonably be expected to earn a subsistence in the prosecution of his regular business."

State v. Township of Osawkee, supra.

Where the legislature of the State of Kansas attempted to authorize municipalities to incur debts for the purpose of giving money to aid manufacturing enterprises, the Supreme Court of the United States, in the case of *Savings and Loan Association v. Topeka*, 20 Wall. 655, said:

"We have referred to this history of the contest over aid to railroads by taxation, to show that the strongest advocates for the validity of these laws never placed it on the ground of the unlimited power in the State Legislature to tax the people, but conceded that where the purpose for which the tax was to be issued could no longer be justly claimed to have this public character, but was purely in aid of private or personal objects, the law authorizing it was beyond the legislative power, and was an unauthorized invasion of private right. *Olcott v. Supervisors*, 16 Wall 689 (83 U. S. XXI, 386):

People v. Salem, 20 Mich. 452; *Jenkins v. Andover*, 103 Mass., 94; Dill. Mun. Cor., sec. 587; 2 Redf. R. R. 398, rule 2.

"It must be conceded that there are such rights in every free government beyond the control of the State. A government which recognized no such rights, which held the lives, the liberty and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism. It is true it is a despotism of the many, of the majority, if you choose to call it so, but it is none the less a despotism. It may well be doubted if a man is to hold all that he is accustomed to call his own, all in which he has placed his happiness, and the security of which is essential to that happiness, under the unlimited dominion of others, whether it is not wiser that this power should be exercised by one man than by many.

"The theory of our governments, state and national, is opposed to the deposit of unlimited power anywhere. The executive, the legislative and the judicial branches of these governments are all of limited and defined powers.

* * * * * * * * * * * * * *

"To lay, with one hand, the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation. This is not legislation. It is a decree under legislative forms."

Cole v. City of LaGrange, 113 U. S. 1, 28 L. Ed. 896;

Parkersburg v. Brown, 106 U. S. 487, 27 L. Ed. 238;

We refrain from citing many cases from many jurisdictions upholding the principle for which we are here

contending. The recent decision of this court in the Pension Case (*Railroad Retirement Board vs. Alton Railroad Co.*, 295 U. S. 330) conclusively supports it.

The Act of Congress was invalidated in the Pension Case because it violated the due process clause of the Fifth Amendment, which is the same as the due process clause of the Fourteenth Amendment, applicable to state legislation, and also because it did not constitute regulation of interstate commerce under the Commerce Clause of the Constitution. (In the latter respect it is in harmony with the decisions in the AAA and Guffey cases cited under Point I in holding that Congress cannot legally legislate outside of the field of its power, even though it uses the disguise of taxation.)

It is submitted that an examination of the provisions of the Railroad Retirement Act will show it is strikingly similar to those of the Alabama Compensation Insurance Act. It will be difficult to find a closer precedent. The Railroad Retirement Act established compulsory retirement and a pension system, for all interstate railroad carriers.

(The state act establishes a compulsory employment compensation for all employes of a narrowly defined class of employers.)

In the pension act there was a provision for the creation of a fund to be deposited in the United States Treasury, and administered by a board denominated an independent agency in the executive branch of the Government.

(Here we have created through enforced state taxation a fund to be known as an Unemployment Trust Fund to be deposited in the United States Treasury, and to be disbursed, and in reality administered, through a Federal board set up for this purpose.)

The fund which was to be used for pensions to employes and for administrative expenses was to arise from compulsory contributions from present and future employes and from the carriers; the sums payable by the employes were to be percentages of their current compensation, and those by each carrier double the total payable by its employes. The board was to determine from time to time what percentage is required to provide the necessary funds, but until that body otherwise determines, the employe contribution was fixed at two per cent. of the compensation.

(Here the fund is to be made up of compulsory contributions from the employes of the employers and from the employers, the contributions being based on percentages of the wages earned, the per cent. being fixed until 1941 at a fixed amount and after that time in such amount as determined by the board within the range of a maximum and minimum percentage.)

The classes of persons eligible for the pensions were (1) employes of any carrier on the date of the passage of the act; (2) those who subsequently became employes of any carrier; and (3) those who within one year prior to the date of the enactment were in the service of any carrier. To every person in any of the three categories, a pension became payable from the company (a) when he reached the age of sixty-five years, whether then in the carrier's service or not; if still in such service he and his employer might agree if he was to remain for successive periods of one year until seventy years old, when he must retire; (b) at the option of the employe at any time between the ages of fifty-one and sixty-five, if he had served a total of thirty years in the employ of one or more carriers, whether continuously or not. The pensions were payable monthly and the amount was to be ascertained by multiplying the number of years of

service, not exceeding thirty, before as well as subsequent to the date the act was adopted, whether for a single carrier or a number of carriers, and whether continuous or not, by the graduated percentages of the employe's average monthly compensation (excluding all over $300.00). Upon the death of an employe before or after retirement, his estate shall be repaid what he had contributed to the fund, with three per cent. interest compounded annually, less any sums received by him from the Pension Fund.

It is therefore seen that the Railroad Retirement Act and the state act proceed on closely analogous theories. Both statutes provide for contributions from employers and employes to a central federal pool, from which benefits are payable solely to former employes. Both statutes treat all employers affected as a single group irrespective of their different positions. Both statutes grant money as a matter of right from one class to another and without regard to need. Both grant full cash benefits to former employes (the one when they become sixty-five years old; the other a designated number of weeks after registering as unemployed) who have been discharged for misconduct. Both require the employer to pay fixed amounts based on the payroll without regard to the number, in the one case of its superannuated employes, and in the other of its unemployed employes.

The state act goes further and requires fixed amounts from an employer irrespective of the number of his employes who may become unemployed. Men are bound to reach the age of sixty-five but it is not at all inevitable[1] that a given employer in Alabama will have no unemployment in his business which may be regularly expanding from one year to the next. Both acts were

[1]The evidence in this case proved this to be certain (Affidavits R—230, 214, 260, and 268.)

based on the same social theory and both claimed to have been enacted for the public welfare and to serve a National need.

We quote from the decision in the Pension Case:

> "Certain general features of the system violate the Fifth Amendment. Under the statutory plan the draft upon the pension fund will be at a given rate, while the contributions of individual carriers to build up the fund will be at a disparate rate. This results from the underlying theory of the Act, which is that all the railroads shall be treated as a single employer. The report of the Senate subcommittee announced: 'It is agreed that all railroads which have been subjected to the jurisdiction of Congress are to be treated together as one employer. All persons in the service of the railroads are to be regarded as employes of the one employer. * * * The old age pension or annuity is to be based upon the wages and the length of service upon all railroads, with specified maximum limits.'"

(In like manner the state act treats all employers falling within the defined class in effect as one employer; and all employes as one class no matter whom their employers may be; every employer and every employe contributing to the pool fund without reference to whether the employes ever become eligible for compensation.)

> "The evidence shows that some respondents are solvent and others are not, a situation which often may recur. The petitioners concede that the plan is intended to furnish assurance of payment of pensions to employes of all the carriers, with the result that solvent railroads must furnish the money necessary to meet the demands of the system upon insolvent carriers, since the very purpose of the Act is that the pension fund itself shall be kept solvent and able to answer all obligations placed upon it."

(Likewise the state act makes solvent employers and their employes carry the burden of insolvent employers and their former employes.)

"This court has repeatedly had occasion to say that the railroads, though their property be dedicated to the public use, remain the private property of their owners, and that their assets may not be taken without just compensation. The carriers have not ceased to be privately operated and privately owned, however much subject to regulation in the interest of interstate commerce. *There is no warrant for taking the property or money of one and transferring it to another without compensation, whether the object of the transfer be to build up the equipment of the transferee or to pension its employes.* * * *

"The argument is that, since the railroads and the public have a common interest in the efficient performance of the whole transportation chain, it is proper and necessary to require all carriers to contribute to the cost of a plan designed to serve this end. It is said that the pooling principle is desirable because there are many small carriers whose employes are too few to justify maintenance of a separate retirement plan for each. And, finally, the claim is that, in fixing carrier contributions, any attempt to give consideration to difference in age, classification, and service periods of employes would involve grave administrative difficulties and unduly increase the cost of administration. With these considerations in view, the petitioners urge that our decisions sanction the exercise of the power involved in the pooling feature of the statute. * * *

"We conclude that the provisions of the Act which disregard the private and separate ownership of the several respondents, treat them all as a single employer, and pool all their assets, regardless of their individual obligations and the varying conditions found in their respective enterprises, cannot be justified as consistent with due process."

The court further said in the Pension Case:

> "It is arbitrary in the last degree to place upon the carriers the burden of gratuities to thousands who have been unfaithful and for that cause have been separated from the service, or who have elected to pursue some other calling, or who have retired from the business, or have been for other reasons lawfully dismissed."

(The state act does all of this and more. It requires the employer to support the employe who steals his funds or, while on strike, dynamites his property.)

And in calling attention to the fact that the act denied due process of law in giving pensions to those who had left the carriers' employ, the court said:

> "Plainly this requirement alters contractual rights; plainly it imposes for the future a burden never contemplated by either party when the earlier relation existed or when it was terminated. The statute would take from the railroads' future earnings amounts to be paid for services fully compensated when rendered in accordance with the contract, with no thought on the part of either employer or employe that further sums must be provided by the carrier."

There is nothing new in the decision of the Court in the Pension Case to the effect that there is a denial of due process when you take property of one and bestow it on another. It has been uniformly held that if Congress levies or collects a tax for purposes other than the "common defense" and the "general welfare" of the United States (the AAA case and the Guffey case cited under Part I definitely held that this tax cannot come under the general welfare clause) it constitutes taking property

without due process of law in the exaction and is therefore unconstitutional.

In all of the above cited cases, and in many others from numerous jurisdictions, plausible arguments were advanced to the effect that the public as a whole would benefit indirectly by the proposed appropriation of the moneys to be raised by taxation. Nevertheless, in every case and *irrespective of any express constitutional prohibition,* the legislation fell when an attempt was made to employ the taxing power for an essentially private purpose; an indirect and remote benefit to the nation, state or community was never deemed a ground for the direct spoliation of one group of the population at the behest and for the profit of another group however large. Such legislation has been uniformly condemned because depriving the taxpayer of his property without due process of law, his private property being taken for private use without just compensation.

If it is thus beyond the power of the sovereign, by means of general taxation, to accomplish such ends, it follows that any attempt to tax *a part only of the public,* or specific corporations or classes or individuals, for such ends is *a fortiori* an abuse of power.

Probable Contentions of Appellants

Appellants cite as sustaining their claim that the Federal and State Acts are in the public interest and, therefore, justified under the so-called "Welfare Clause" of the Federal Constitution, a number of cases which not only can be easily differentiated from the present case but have been so differentiated by the Supreme Court of the United States in its recent decisions. Among the cases cited by the appellant are cases sustaining Workmen's Compensation Acts, illustrated by the case

of *Mountain Timber Company v. Washington*, 243 U. S. 219; the bank cases illustrated by the case of *Noble State Bank v. Haskell*, 219 U. S. 104; the Head Money Cases illustrated by the case of *Eddye v. Robertson*, 112 U. S. 580. The inapplicability of these cases and other cases relied on by the defendants has been so clearly set forth by the Supreme Court in its recent decisions that it is only necessary to refer briefly to these decisions.

In differentiating the case of *Mountain Timber Co. v. Washington*, 243 U. S. 219, the Supreme Court, in the Pension Case, used the following language:

> "For the purpose of payments into the fund accounts were to be kept with each industry in accordance with a statutory classification, and it was *definitely provided* that no class should be liable for the depletion of the accident fund by reason of accidents happening in any other class. The act, therefore, clearly recognized the difference in drain or burden on the fund arising from different industries and sought to equate the burden in accordance with the risk. The challenge of the employers was that the statute failed of equitable apportionment as between the constituted classes. But no proof was furnished to that effect, and this court assumed that the classification was made in an effort at fairness and equity as between classes. The Railroad Retirement Act, on the contrary, makes no classification, but, as above said, treats all the carriers as a single employer, irrespective of the several conditions."

The state act makes no classification among the employers affected, treats them all as one great mass, makes employers in nonseasonal industries subsidize unemployment of employes in seasonal and casual employments; requires stenographers and bookkeepers in a law office to contribute to benefits for the unemployed in the oyster business, the employes of stores in the strictly

farming section of Alabama to pay benefits to ore miners in the mineral belt, and establishes a pool fund to which all employers are required to contribute without any reference to, or trace of, obligation to the vast majority of those who are authorized to receive benefits from the fund.

Additional conclusive evidence of the inapplicability of the Workmen's Compensation cases can be found by reading from the opinion of the Court in the Pension case, 295 U. S. 330, at pp. 369, 371.

The case of *Noble State Bank v. Haskell*, 219 U. S. 104, and similar cases, were distinguished in the Pension Case. The Haskell case upheld an Oklahoma statute which required state banks to contribute a uniform percentage of their deposits to a state guarantee fund established for the purpose of making good losses to the depositors of banks which might become insolvent. In the Bank Case the Supreme Court pointed out that banks are peculiarly subject to regulation. For example, the state may fix a minimum of capital required of those desiring to engage in the banking business; investments of banks may be restricted by law; examinations may be made by the state and the cost thrown on the bank; special methods of liquidation are provided, etc., etc. Stress was laid upon the fact that all banks, as financial institutions, would benefit by the prompt payment of depositors in the event of insolvency of any one bank.

Under the Alabama law, however, thousands of persons of every kind and character, whose business is wholly private in nature, are made subject to compulsory exactions in favor of individuals having no relation whatever to the persons from whom the money is taken.

In distinguishing the Bank Case from the pension scheme, Mr. Justice Roberts, at page 360, said:

"In the second case (Haskell Case) this court upheld a statute which required state banks to contribute a uniform percentage of their deposits to a state guarantee fund established for the purpose of making good losses to the depositors of banks which might become insolvent. The Act was sustained upon the principle that an ulterior object, even, may justify the taking of a comparatively insignificant amount of private property for what, in its immediate purpose, is a private use. It was further said that there may be cases other than those of taxation in which a share of each party in the benefits of a scheme of mutual protection is sufficient compensation for the correlative burden which it is compelled to assume. These considerations clearly distinguish that case from the one now under discussion."

The final answer to appellants' support of the pool plan provided for by the state act is found in the following conclusions of the Supreme Court of the United States in the Pension Case:

"We conclude that the provisions of the Act disregarding the private and separate ownership of the several respondents, treating them all as a single employer, and pooling all their exactions regardless of their individual obligations and the varying conditions found in their respective enterprises, cannot be justified as consistent with due process."

It should be noted, of course, that the varying conditions found in the respective enterprises covered by the state act are multiplied a thousand fold in comparison with the enterprises affected by the pension law. Under the Alabama statute every kind of enterprise employing eight employes or more is forced to meet the exactions of the law and contribute to the pool fund, whereas, in

the pension case only railroads whose businesses partake of many similarities were included.

Likewise, appellants can find no support for the state act in the *Head Money Case* (*Eddye v. Robertson*, 112 U. S. 580). This case had under consideration an Act of Congress regulating immigration. In order to discourage steamship companies from dumping in America, "criminals, paupers, and diseased persons," the statute required the companies to pay the sum of fifty cents for all passengers not citizens of the United States. The money was to be paid into the United States Treasury and was to constitute a fund to be used for the defraying of the expenses of regulating immigration under the act and for the relief of immigrants in distress. The court held that the burden imposed on the ship owners "is a mere incident of the regulation of commerce,—of that branch of foreign commerce which is involved in immigration." Otherwise stated, the imposition found a constitutional basis under the commerce clause of the Constitution. The imposition was held not to be a tax within the meaning of the Constitution, but, rather, an incidental sum derived from a statute the primary purpose of which was the regulation of immigration. The Head Money Statute was designed primarily to check undesirable immigration by imposing a burden upon ship owners subject to regulation under the commerce clause who did the act deemed undesirable. The unemployment compensation law, on the other hand, purporting to operate under the tax clause of the Constitution, exacts money from the employer in direct ratio to the number of persons to whom he gives employment. The more employment he gives the greater the forced contribution on his part.

In the effort to differentiate the Pension Case from the one under consideration appellants emphasize par-

ticularly the retroactive effect of a part of the statute and entirely overlook the other and more emphasized reasons assigned by the Supreme Court for holding the pool fund unconstitutional as violative of due process.

As a matter of fact, however, the state act contains a retroactive provision which will operate against employes, namely, the provision in the act which will bestow the additional benefits [Section 5 (f)] in the ratio of one week of total unemployment benefit or its equivalent to every unit of twenty aggregate weeks employment accruing in the 260 weeks preceding the close of the employe's most recent week of employment. When benefits become available on and after January 1, 1938, under this provision many employes may and many may not be paid additional benefits ascertained under the five-year retroactive yardstick furnished by this provision of the act.

This Court has very recently, in the case of *Thompson vs. Consolidated Gas Utilities Corporation* (in MSS.) reasserted the prohibition of the Constitution against the taking of private property, without just and full compensation, for a non-public purpose. In this case the State of Texas sought to sustain the Texas statute (House Bill 266) under the authority of which the Railroad Commission of Texas sought to regulate the production of sweet gas from wells in the Panhandle oil fields under the contention that it was justified under the police power of the state because for "a public purpose."

The Court said:

> "Our Law reports present no more glaring instance of the taking of one man's property and giving it to another. In Missouri Pacific Ry. Co. v. Nebraska, 164 U. S. 196 (note no. 30); Great Northern Ry Co. v. Minnesota, 238 U. S. 340; Great Northern Ry. Co. v. Cahill, 253 U. S. 71;

Delaware, Lackawanna and Western R. R. Co. v. Morristown, 276 U.S. 182, and Chicago, St. Paul, Minneapolis & Omaha Ry. Co. v. Holmberg, 282 U.S. 162, expenditures directed to be made for the benefit of a private person were held invalid, although the party ordered to pay was a common carrier. In Loan Association v. Topeka, 20 Wall, 655, and Cole v. LaGrange, 112 U.S. 1, the payments ordered for the benefit of a private person were declared invalid, although the money was to be raised by general taxation. In Myles Salt Co., LTD. v. Board of Commissioners, 239 U.S. 478, the exaction was held unlawful, though imposed under the guise of an assessment for alleged betterments. Compare Georgia Railway & Electric Co. v. Decatur, 295 U. S. 165. And this Court has many times warned that one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid. See Hairston v. Danville and Western Ry. Co., 208 U.S. 598, 605, 606; Rindge Co. v. County of Los Angeles, 262 U.S. 700, 705. Compare Cincinnati v. Vester, 281 U.S. 439, 446, 449."

Proposition II.

SECTION 4 (d) OF THE STATE ACT IS IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES BECAUSE IT TAKES PRIVATE PROPERTY FROM ONE CLASS FOR THE USE OF ANOTHER; ITS PURPOSE IS NOT A PUBLIC PURPOSE IN THE SENSE IN WHICH THE WORDS "PUBLIC PURPOSE" ARE USED AS JUSTIFYING THE TAKING OF PRIVATE PROPERTY WITHOUT JUST COMPENSATION.

If the exaction against employers is in violation of the Fourteenth Amendment because it is a taking of private property from one class for the use of another, a fortiori, is Section 4 (d), which imposes a tax upon employes. This is demonstrated by a consideration of the following facts:

(a) Title IX of the federal act imposes no tax upon employes. It places the entire cost of the project on the employers on the theory that industry can properly be charged with the burden because of its ability to pass the cost on to customers and consumers, and it uses the modus operandi of the tax credit "device" for the purpose of applying the pressure on the states to enact uniform unemployment statutes in order to insure just and fair competition. It was never intended by the federal act to impose a tax under Title IX upon employes. The imposition by Alabama of this tax is almost an anomaly, and is foreign both to the purpose of Title IX and to the means provided for effecting the purpose.

(b) The *New York Unemployment Insurance Law* (Laws 1935, c. 468; Consolidated Laws c. 31), the only state act previously under consideration by this Court in *Chamberlain, Inc. vs. Andrews, et al*, did not impose any tax upon employes.

This case, therefore, presents the first case for the consideration of this Court involving the validity of taxes imposed upon employes of a defined class having fellow employes of seven or more.

(c) The discriminatory and capricious features in the state act, as marked and as arbitrary as they are with reference to employers, are much more striking and glaring in reference to employes.

(d) In the case of the employe there is no basis for the argument made by appellants to support the tax

against the employer that there exists a duty on the employer to prevent unemployment.[1]

(e) The principal argument of appellants to sustain the tax against the employer is that benefits can properly be financed by employers as a business cost.[2]

(f) The reasons assigned in (d) and (e) above in support of a tax on employers, provided the classification is reasonable and not capricious, as was found to be the case in the Workmen's Compensation Cases, are not applicable in the case of the tax against employes.

How can the employe control the cost of his employer's product? Appellant's brief, and the cases cited in support, are predicated upon the fact that the tax against the employer is justified because it can be passed on to the consumer, and, therefore, in the last analysis, falls upon the general public, which is interested in the general welfare. How can the tax against employes be passed on by them to the public? On the contrary, there may follow exactly the opposite result, namely, the en-

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[1]That such a duty arose against the employer was held by the Court of Appeals of New York in the case of *Chamberlain, Inc., vs. Andrews*, 2 N. E. (2nd Series) 22, in the following words: "If industry, charged with the responsibility of supplying work, can not provide him ('the employe') one ('a job'), then it should be compelled to contribute to a fund from which he and his family may have bread while he is without employment."

[2]This thought is expressed in the majority opinion of the Court of Appeals of New York in the Chamberlain Case, supra, in the following language: "Instead of the policy of taxing all the people directly, it ('the Legislature') has passed a law whereby employers are taxed for the help of the unemployed, the sums thus paid being cast upon the public generally through the natural increase in the prices of commodities. Whether relief be under this new law of the Legislature or under the dole system, the public at large pays the bill."

In the case of *Howes Bros. Co. v. Massachusetts U. C. Commission*, 5 N. E. (2nd Series) 720, 726, the Supreme Judicial Court of Massachusetts, in sustaining the tax, used the following language: "Workmen's compensation acts have been supported as an exercise of the police power. Their effect is to impose on the designated classes of employers of labor the burden of compensation for injuries to employes arising out of and in the course of their employment, leaving the employer to reimburse himself for the expense as a part of the cost of his product. (Citing New York Central Railroad Company vs. White, 244 U. S. 188; Mountain Timber Co. vs. Washington, 243 U. S. 219, and other cases.) In reasoning it is difficult to distinguish these decisions from the case at bar."

forced reduction of wages by the employers when this tax, becoming more and more onerous, prevents its being passed on to a public refusing to purchase at an overbearing cost. Can it be seriously contended that the Washington Workmen's Compensation Law, or that of any other state, would have been sustained if, like the state act, it had imposed upon all employes of a definite class a tax to establish a pool fund out of which injured employes would receive compensation?

(g) The federal act imposes no tax on employes and it allows no credit to employes on any tax paid by them. (Sections 901, 902).

(h) Proponents of the federal act claim that stabilization of employment is its main object; that no economic system can afford to accept wide fluctations of employment as permanently necessary and inevitable. Taxes against employes can not possibly be related to stabilization of employment. The hiring and firing is done by the employer. If employment is to be stabilized each management must tackle the job and be given inducement to smooth out the peaks and valleys. It can not be had by *taxing* the employe.

(i) None of the decisions of this Court cited by appellants in support of their claim that the state act is not in violation of the Fourteenth Amendment to the Constitution can be made applicable, even by argument, to the tax imposed against the employes.

1.—The case of *Mountain Timber Company vs. Washington*, 243 U. S. 219, and other cases involving state workmen's compensation laws, which, as stated by appellants, "have universally treated work injuries as a cost of production by requiring the employer to pay for them," can not possibly be extended so as to require the EMPLOYE to make payments for anticipated injuries or anticipated unemployment.

2.—The case of *Noble State Bank vs. Haskell,* 219 U. S. 104, on the theory that banking was a business invested with the public interest, and because of the fact that every bank is interested in the solvency of other banks in the state and affected by their insolvency, and for other reasons sustained a tax against the BANK based on a designated per centum of its average daily deposits to create a fund out of which full repayment might be made of the deposits in any bank that failed.

As previously pointed out, this case is inapplicable to the employer, but even if applicable, how could it possibly be applied to the tax imposed by the state act against employes? Can it be contended that this Court would have sustained the Oklahoma bank statute if it had imposed the tax not only against the bank on the basis of its deposits but had sought also to tax each individual depositor?

3.—In the *Head Money Cases,* 112 U. S. 850, the right of the Congress under the commerce clause of the Constitution to regulate by the bringing of indigent immigrants to the United States by steamship companies engaged in foreign commerce was upheld. Can it be seriously contended that such a tax would have been sustained (aside possibly from the power contained in the commerce clause) had it been imposed upon the ship's crew of the steamship company?

4.—Similarly, in the cases of *Phoenix Insurance Co. v. Fire Department of City of Montgomery,* 117 Ala. 631, and *Cobb v. Home Insurance Co. of New York,* 91 So. 627, relied upon by appellants, would this Court, although it might follow the Supreme Court of Alabama in sustaining a tax against fire insurance companies, dependent for continued existence upon fire protection, for the assistance of firemen engaged in the public duty of fire protection, sustain a tax against the firemen for the

benefit of other firemen or the families of other firemen? Otherwise stated, could the fire departments in Alabama be constitutionally grouped in a class and required to deposit into a pool fund a certain per centum of their income for creating an insurance fund for the benefit of all firemen and their families? If so, there is no limit to the probabilities of such a ruling. On the same basis lawyers could be forced to contribute to a pool fund for the support of indigent lawyers; physicians for the unfortunate members of their profession; etc., ad infinitum.

It is submitted that if there can be any doubt as to the unconstitutionality of Section 4 (a), (b) and (c) of the state act imposing the tax upon employers, no such doubt can be found in considering the tax imposed by Section 4 (d) of the state act against employes.

Proposition III.

IF SECTION 4 (d) OF THE STATE ACT IS UNCONSTITUTIONAL, THE ENTIRE ACT, NOTWITHSTANDING THE SEPARABILITY CLAUSE, MUST FALL.

Carter v. Carter Coal Co., 298 U. S. 238, 312 313;
Railroad Retirement Board v. Alton Railroad Co., 295 U. S. 330, 362.

No one can conclude that the Legislature of Alabama would have passed the state act if the provision for taxes against the employes had been eliminated. This provision was inserted deliberately, notwithstanding it was not one of the "must" provisions of the federal act. When the act was before the Legislature for a *slightly* more mature consideration at its special session and was amended in many particulars, the Legislature again

evinced its determination to impose the tax on employees and again legislated this provision into the body of the act. To remove it takes away more than one-half of the 1936 fund which the Legislature deemed necessary for the purposes of the legislation. To hold this provision invalid and the remaining provisions of the state act valid the Court would in effect enter into the legislative field.

Proposition IV.

THE EXACTIONS IMPOSED BY THE STATE ACT ARE IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES BECAUSE IN THEIR CLASSIFICATION AND OTHER FEATURES THEY ARE UNREASONABLE, ARBITRARY OR CAPRICIOUS.

There can be no doubt about the general principles which govern courts in determining whether federal statutes are in violation of the Fifth Amendment or state statutes in violation of the Fourteenth Amendment because unreasonable, arbitrary or capricious. The rule is clearly expressed in the opinion of the Supreme Court of the United States in the case of *Nebbia v. People of State of New York*, 54 Sup. Ct. Rep., page 510 (4, 5), in the following language:

> "The Fifth Amendment, in the field of Federal activity (Adyston Pipe & Steel Co. v. U. S. 175 U. S. 211, 228, 229), and the Fourteenth, as respects State action (Barber v. Connolly, 113 U. S. 27, 31; Chicago B. & Q. R. Co. v. ex rel. Illinois, 200 U. S. 561, 562), **do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the**

guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. It results that a regulation valid for one sort of business, or in given circumstances, may be invalid for another sort, or for the same business under other circumstances, because the reasonableness of each regulation depends upon the relevant facts."

Let us consider the relevant facts in the case under consideration as the proper yardstick for determining the validity of federal and state acts under the definition quoted above.

Summary of Unreasonable, Arbitrary or Capricious Provisions of Federal and State Acts.

(a) The act makes no classification among the employers and employes affected and treats them all as one mass. For illustration, employers and employes in non-seasonal industries are called upon to subsidize the unemployed employes of seasonal and casual employers; employers and their employes engaged in the practice of professions and who work three hundred and sixty-five days in the year, are taxed to pay benefits to employes engaged in a canning factory during its seasonal operation.

(b) While the act operates solely on a limited employe relationship, the payment of benefits is on an entirely different theory from that which has been approved under workmen's compensation laws.[1] Work-

[1]Even in the case of workmen's compensation the Court will note that in Alabama and numerous other states there are such doubts of the constitutionality of a compulsory law on this subject that it is left to the election of the employer and employee as to whether or not they will accept the provisions of the act.

men's compensation laws pay compensation for injuries, disease or death only if they arise *out of* the employment, while under this act benefits are paid without reference to the cause of nonemployment, without any casual connection between the employment and the resultant injury. Employers are not responsible for weather conditions, European wars, floods, droughts, economic laws, such as supply and demand, foreign competition in world markets, etc., but under the provisions of this act the employers and employes are taxed for the relief of unemployment on account of factors beyond their control, and for which they are no more responsible than are all other classes of citizens.

(c) The taxes are imposed and the benefits are paid to unemployed individuals regardless of the amount paid into the fund by their former employers, by themselves, or by their fellow employes. Thus a paying employer and a paying employe bear the burden of the defaulting employer or the unemployed employe. The diligent takes care of the shiftless.

(d) The benefits are paid without regard to the changing residences of the unemployed individual (aside from the irrevisable rules of the Commission in reference to reporting for work,—such reports may be in writing). Thus an Alabama employe becoming entitled to the benefits under the Alabama law may remove to and become a citizen of the State of California or some other state which may or may not have adopted a federally approved law, and all Alabama employers and employes will be required to continue to pay his benefits.

(e) The benefits are paid as of right and without inquiry as to the need of the donee. Thus employers and employes may be taxed to pay benefits to an unemployed individual who during the time of his employment has accumulated a competency and who has ample means

not only to take care of himself, but if he wishes, to take care of others who have not been so saving or prudent.

(f) An employe discharged for unfaithfulness or peculation, drunkenness, sabotage, or any other just cause, receives a full monetary benefit—a far cry from the statutory declaration of policy as to "persons unemployed through no fault of their own"; an employe who voluntarily abandons his job is entitled to the benefits; an employe who refuses to accept a position vacated by a man who, with or without cause strikes, is entitled to full monetary benefits—a strange commentary on the statement of the declaration of policy relating to "involuntary unemployment"; benefits are not taken away even though employment is offered in the same village at a living wage if such wage is found to be substantially less advantageous to the employe than that prevailing in the same locality; and the unemployed (with the exception of a short waiting period) does not lose his benefits though work is obtainable at a *better wage*, the work, however, not being similar to the work that he was doing at the time the unemployment occurred.

(g) The benefits are paid without any reference to the physical or financial condition of the recipient.

(h) Instead of sub-classifying by trades, industries or occupations, treating all within each trade in the same manner, any employer employing eight or more employes and his employes must pay the imposed taxes and any employe who has seven or more fellow employes is entitled as a matter of right to the benefits. This is discrimination run riot. The mere accident of number is made the signal to tax and to receive benefits. Thus a business where there are seven employes may and often does under more efficient management or under different conditions, produce more business than a

similar business employing eight or more employes. Employers of the latter are taxed and their employes are eligible for benefits while employers of the former are not taxed and their employes are not eligible for benefits. Again, a business where there are seven employes may produce the same amount of the same product as a business employing eight employes, both businesses may be side by side, identical in character, have an equal volume, make the same profit or sustain the same loss, and yet the employer and his employe in one case pay the tax and the employes receive the benefit and the other does not. Will an employe having six fellow employes consume more goods or service than an employe having seven fellow employes? Will the former suffer less from unemployment or be less apt to become a public charge than the latter?

(i) The recipient of the benefits is not required to show that he is in need; the statute contains no provision guaranteeing that the benefits will be used to support the recipient, nor does it contain any provision controlling in any respect the use of the benefits by the recipient for any purpose, public or private; the benefits are payable to a minor despite the fact that such minor may be actually supported by his parents; to a married woman despite the fact that she may be supported by her husband; to a divorcee despite the fact that she may be receiving alimony; and to unemployed individuals despite the fact that they have been fully compensated for their services as employes and have no legal, equitable or moral claim upon any of the persons required to make contributions to the fund; no part of the fund is for the use of the state but is solely and exclusively for the payment of benefits to individuals; and last but not least, the benefits are not payable to all unemployed employes but to only a sharply defined, limited number, who in

many instances have been unemployed for a shorter time than the thousands of workers not covered by the statute.

(j) Ship owners employing hundreds of sailors, stewards, cooks and others, and their employes are excluded from the tax and benefit, while employers in transportation services on land and their employes must pay the tax and their employes be allowed the benefits; railroads and their employes are exempted from taxation and the employes denied the rights of benefits, while bus and air carriers engaged in exactly the same type of business are taxed and their employes entitled to benefits; the owner of, and the chauffeur for, a private car are exempted, but if the same chauffeur is employed to drive a taxi, he and his employer must pay the tax and he becomes entitled to the benefits.

(k) Insurance companies, (State Act, Sec. 2-6) employing thousands of solicitors or agents, and their employes, are excluded from exactions and benefits while employers in many other kinds of businesses, and their employes, are required to pay the tax, and their employes, if eligible, may receive the benefits.

Surely there can be no possible justification for excluding from the law an employe-solicitor of an insurance company and including in it an employe-solicitor of a real estate agency. Every one knows that in most cases the same company operates under the same roof and at the same desks an insurance business and a real estate business employing the same type of salesmen and paying them on a commission basis.

(l) This so-called tax for aiding the unemployed falls most heavily on the man who keeps people regularly employed; the man who employs fewer persons and at irregular and casual intervals, pays nothing, or pays less.

(m) It is idle to say that employes in the various exempted classes may not be just as needy and desirous of national aid and philanthropy as any other employe in any other service. Again, if wholesale benefits are so desirable for public welfare, why should employes in the exempted classes be prohibited from receiving their share of this national philanthropy? Again, no reason may be found why the employes in the exempted classes (if they desire compensation insurance) should be required to purchase it while others who will suffer no more from unemployment will be provided with insurance by a benevolent and paternal government. Does a domestic in a private home who becomes unemployed suffer any less than a chamber maid in a hotel who loses her job? Why should the employe of a commercial greenhouse be subject to the act when the farm hand working across the fence from him is outside its scope?

(n) The state act by exacting contributions from seasonal industrial workers and their employers and imposing general qualifications for benefits not applicable to the periods of their employment deprives them, as well as their employers, of property without due process of law.

The state act provides that an employe is not eligible to benefits unless he has been gainfully employed in the state for a specified number of weeks within a specified time. This requirement applies to all workers contributing under the state act, and the state act in no way makes it possible to alter these qualifications for the special situation of a seasonal worker who, although required to pay the tax, because of the nature of his employment will, in many instances, be unable to meet the general qualifications, which were made for the worker who has the possibility of a year-round employment.

It is denial of due process for the Alabama act to *demand* and *exact* contributions from the seasonal employer and employe, and then to set up conditions and qualifications for benefits which the seasonal worker, though probably employed throughout his entire season, cannot meet merely because of the seasonal character of the taxed employment. While the burden of taxation cannot be nicely adjusted between burden and benefit, the Legislature must recognize natural and well defined classes when legislating to provide a system of unemployment benefits.

In some cases it will be impossible for the seasonal worker to fulfill the employment period requirement if the season is less than twenty-six weeks or, if the season is longer, he must remain continuously employed during all or most of the season; whereas the worker in a year-round industry has an opportunity for employment within the entire year and the requirement of one-half a year's employment is obviously drawn upon the possibility of there being year-round employment.

The failure to make special provision for the Alabama seasonal worker results in the imposition of a burden without any corresponding benefit.

The Constitution does not allow the burden of this special taxation to be placed on seasonal employers and employes, and the Legislature to impose qualifications for benefits which will deprive the seasonal employe of a proportionate equal opportunity for benefits based upon the nature and character of his employment. It must be borne in mind that contributions are required from the employer on the theory that unemployment may be considered a cost of production just as the injuries suffered in industry are so considered, and that the employer's contributions go to maintain a reserve of labor, and hence may properly be considered an item of over-

head expense. The exaction from the employer is further defended on the ground that he, as a producer, is indirectly benefited by the general business activity which is maintained through the maintenance of the purchasing power of the unemployed. The exaction from the employe is defended on the ground that he should contribute as he is the one who is primarily benefited, and that, by these contributions, the employe maintains his morale and self-respect.

But the general and non-adjustable qualification period of employment denies to the seasonal employee the possibility of receiving benefits, and therefore denies to employer and employe the very things by which the tax upon them is defended. Thus the protection and help which the act seeks to provide become for the taxed seasonal worker and his employer a delusion and an empty promise. The statute so imposing inescapable burden but denying any possibility of benefit is an unreasonable discrimination and a clear taking of property without due process of law.

In this connection it should be noted that the Unemployment Acts of New York (Labor Laws, Art. 18, Section 508), Idaho (H. B. No. 8-18A), Oregon (Sp. Sess. 1935, H. B. 71, Sect. 7), Massachusetts (General Laws 1932, Chap. 151-A, Section 26), and, we understand, the laws of other states all contain provisions not found in the Alabama act which make special provision for the seasonal worker.

The evidence in this case discloses that there exist in this state many seasonal businesses and occupations. The appellee, in common with all commercial coal operators in the State of Alabama, is engaged in a seasonal business, while appellee Gulf States Paper Corporation, in this Court, is engaged in a business that works on double shifts for the entire year. Not only does the evidence

in this case show the existence of seasonal businesses, the unfair operation of the law against such businesses and their employment personnel, but the Court, we submit, can take judicial knowledge of the fact that there are many other businesses in Alabama which are distinctly seasonal—for illustration, the oyster and fish business, cotton seed oil mills, cotton compresses and warehouses, canning and preserving of fruits, saw mill and logging industry, naval stores and supplies, professional baseball[1], etc., etc., including the building trades.

(o) Further illustrating the arbitrary feature of the tax as against employees, we submit that there is no reason for imposing taxes upon a truck driver who hauls dirt for a contractor and not imposing any tax upon a truck driver who hauls dirt for a city or one who hauls farm produce for a farmer. There is no reason for imposing taxes on a waitress in a restaurant and not imposing any tax upon the domestic servant. While public employers may be less prone to reduce expenses to conform to reduced income than are private employers, is there any reason why public employees should not contribute to the so-called *general welfare* by helping those who do lose their employment to continue their power to consume goods and services? Experience shows that even during the recent period of unemployment only one out of four persons formerly employed lost his job. Then why should the public employe or the agricultural laborer be exempt from contributing to this so-called *general welfare* and the three out of four employes in private employment who, according to experience, will not lose their jobs, even in a severe depression, be compelled to contribute? The only answer is that the classification is purely arbitrary and is based upon an erroneous

[1]In a recent release the Treasury Department has held baseball players employees under the act.

assumption of similarity between the acts here in question and the Workmen's Compensation Act.

> "Immunity granted to a class, however, limited, having the effect to deprive another class, however limited, of a personal or property right, is just as clearly a denial of equal protection of the laws to the latter class as if the immunity were in favor of, or the deprivation of right permitted worked against, a larger class."
>
> *Traux v. Corrigan*, 257 U. S. 312, 66 L. Ed. 254.

(p) The act, both in reference to the schedule of contributions exacted and the schedule of benefits to be paid, is entirely arbitrary because of the evidence in the case to the effect that there has never been made in Alabama any investigation or survey of any kind, nor was there available to the Legislature any statistical or actuarial information upon which it could act in any other way than mere guess work or speculation.

In contrast with the precipitate action of the Alabama Legislature in swallowing whole the provisions of the federal act, the Legislatures of New York, California, and other States have appointed commissions for the purpose of making a full study of the situation in these States, and had before them, at the time of the enactment of the law, lengthy and well considered reports of these commissions.

(q) Emphasizing the total lack of test or experience upon which the Legislature could act, and also further illustrating the arbitrary provisions of the act as against the employer, we refer the Court to Section 4 (c) which recognizes the necessity and fairness of a merit test of some kind in determining the amount of contributions to be exacted by a law of this kind. As we have previously

called to the Court's attention, the Supreme Court in the Alton Case reviewed its decision on the constitutionality of the Washington Workmen's Compensation Act (*Mountain Timber Co. v. Washington*, 243 U. S. 219), and pointed out that the act classified employers in each industry and fixed rates accordingly in order to equate the burden in accordance with the risk. The Court then said:

> "The Railroad Retirement Act, on the contrary, makes no classification, but, as above said, treats all the carriers as a single employer, irrespective of their several conditions."

Section 4 (c) of the Alabama act attempts to provide for the basing of rates beginning with the year 1941 on a benefit experience, and attempts to give to the Commission the right to name the rates provided the minimum contribution shall not be less than one and one-half per centum or more than four per centum of the employer's pay roll. We submit that this makes no provision for any true merit rating for, from January 1, 1938, when benefits become payable, to 1941, the contributions of all employers and employees, regardless of merit in maintaining employment, will be used to pay benefits regardless of responsibility for unemployment; whereas, the classification which the Court intimated in the *Alton* case as having saved the pooling plan of the Washington Compensation Law was in effect from the outset of the application of the Compensation Law.

It might be argued that the law may provide for a certain test period in order that employes could be properly classified on the basis of their established records of employment. A statute must be constitutional when enacted and from the beginning. There can be no five-year period of suspended animation. However, the em-

ployer with a good record will not receive retroactively the benefit of the excess of the amount which he, from 1936 to 1941, will have paid to the fund over the benefits paid out to his employees. The record of employment which an employer establishes in that period and which may entitle him to a lower rate classification will only serve as an index of the rate he will pay in the future. Therefore, the Alabama act, which, up to 1941, pools all the contributions of all employers, regardless of their respective records of employment, cannot be justified as consistent with due process. Furthermore, the merit rating provision of the state act provides that in any event an employer, after 1941, must pay at the rate of one and one-half per centum, regardless of a record which at the time shows a safe and proper reserve in his favor.

Again, inasmuch as the act does not provide for individual reserves, some part of the money contributed by some employers will pay for benefits to the employees of others, and, similarly, employees will be contributing to the payment of benefits to other employees.

The constitutional objection from the standpoint of the employe and employer to the pooled fund provided by the state act, is stated in the Supreme Court's comment in the *Alton* case on a similar objection to the pooled Pension Fund of the Railroad Retirement Act:

> "There is no warrant for taking the property or money of one and transferring it to another without compensation, whether the object of the transfer be to build up the equipment of the transferee or to pension its employees."

(r) The act is discriminatory and arbitrary in that it makes no distinction of any kind in reference to solvent employers and their employes and employers and

their employes who become insolvent or go out of business after the act has been placed in operation.

It must be admitted that under the pooling plan some employers will go out of business and become insolvent. Yet, employes of the insolvent employer will continue to draw benefits, in some cases beyond the amount of their and their employers' contributions, from a fund to which the solvent employer's competitors continue to contribute.

At any time we may expect to find businesses on the verge of insolvency and even in the hands of receivers.[1] Under the act employes of such a business may become eligible for benefits without either the employer or the employes having made any contributions of substance to the insurance fund.

The Supreme Court, in *Railroad Retirement Board v. Alton R. Co., supra,* considered similar circumstances of disparity between contributions and withdrawals from the fund, and speaking through Mr. Justice Roberts, said:

> "The evidence shows that some respondents are solvent and others not, a situation which often may recur. The petitioners concede that the plan is intended to furnish assurance of payment of pensions to employees of all the carriers, with the result that solvent railroads must furnish the money necessary to meet the demands of the system upon insolvent carriers, since the very purpose of the act is that the pension fund itself shall be kept solvent and able to answer all the obligations placed upon it."
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> * * * * * * * *
>
> "* * * And all the future employees of any railroad which discontinues operation must be paid

[1] A number of Alabama employers have become bankrupt since, under Court orders, they deposited their 1936 contributions to await the decision as to the state act's validity.

their pensions by the surviving roads. Again the answer of the petitioners is that the amount will be negligible. The fact that millions of dollars are involved in other features of the act will not serve to obscure this violation of due process."

(s) Employers of less than twenty-seven per cent of employes gainfully employed in Alabama are subject to the act. The remainder are excluded either as a result of specific exemptions (railroads, agriculture, etc., section 2 State Act, sections 907 and 903(a) of Federal Act). As a result of the "8 or more" or the "20 week" requirement, those employees excluded are as much or more subject to the likelihood of future employment as those included. The arbitrary double classification in Alabama is demonstrated by the following representative illustration.

Included	Excluded
Employers of 8 or more.	Employers of 7 or less.
Employers of 8 during 20 weeks.	Employers of any number (8, 80, 800, 8000) during 19½ weeks.
Employers of producers of fuel and power competing with Federal proprietary operations.	Employers of Federal proprietary operations.
Employers of labor in industry.	Employers of railway labor.
Employers of clerks and agents.	Employers of agents in the insurance business.

The double classification breaking at the arbitrary line of 8 and 20 weeks conforming precisely to the federal pattern is lacking in any constitutional basis . (See opinion in this case of court below).

(t) The application of the Act has no relationship to questions of probable unemployment, to hazards or business, to similarity of occupation, to volume of production, to need of employes as tested by past experience, or to regular or casual employment. The evidence shows that appellee has been continuously engaged in the business of mining coal since 1925; that while coal production in Alabama is of a seasonal nature and therefore its employes have been employed only on a part-time basis, that the average labor turnover of the appellee has been approximately the low figure of five per cent; that appellees employes, recruited from the farm population when not at work in the mines, have supported themselves and families with farm and garden operations and, therefore, have not become public charges or supported by relief or other funds; that appellees business in the above respects is characteristic of other coal operating companies in Alabama (Affidavit of Peter, R. 220).

Contrasted with the seasonal nature of appellee's business is that of the business of the Gulf States Paper Corporation, which has since beginning of operations been in operation continuously with no unemployment and with no reasonable expectation of unemployment in the future Affidavit of Warner, R. p. 230); another coal operating company having instituted and perfected the use of its lands under the guidance of an expert agriculturist, with free use of cultivating machinery and seeds, with a cooperative system of raising hogs and cattle and canning fruits and vegetables, has so escaped any evils of unemployment as to enable its employes and their families to live well through the depression without receiving any assistance of any kind from the Federal Government or relief agencies (Affidavit Fulghum, R. p. 214); evidence relating to a textile mill (Affidavit Little, R. p. 208);

a wholesale hardware and supply house (Affidavit Childers, R. p. 255); a large manufacturer of steel products (Affidavit Forsyth, R. p. 226); a life insurance company[1] (Affidavit Wellman, R. p. 258); a public utility company whose employees are included within the terms of the Act, while those of the Tennessee Valley Authority, a governmental agency, are excluded (Affidavit Jackson, R. p. 67); and a large manufacturer of automobile tires (Affidavit Craigmile, R. p. 231) all furnish illuminating and illustrative evidence of the unreasonable, arbitrary and capricious provisions of the two acts.

In the above summary of the discriminatory or arbitrary or capricious features of the state act we have given consideration to such features as they effect both employer and employe. As was the case when considering the state act as being violative of the 14th Amendment, its discriminatory and capricious features as marked and as arbitrary as they are in reference to employers, are much more striking in reference to employes. We call particular attention to the language of section 4(d). When the federal patterned law reached Alabama the only substantial change made in the model was the addition to section 4 of section 4(d). The language of 4(d) is almost identical with the language of section 801 of the federal act which imposed an *income tax* upon the individual employe. It is evident, however, that the draftsman of 4(d) overlooked section 811 of the federal act which placed a reasonable limit upon the amount of wages to be taxed by designating $3000.00 as the maximum wage upon which the tax is imposed. Only a few other states have imposed this tax on employes and

[1]Probably through the energy of some insurance agent in the Legislature, the Alabama Act (Section 2, Par. 6, R. p. 55) departs from the double classification in exemption by excluding insurance agents and solicitors. No one can supply a reason as to why solicitors of insurance should be exempt from the Act and solicitors for the sale of real estate and many other products should be included.

these states did not commit this error. The Massachusetts law, for illustration, provides that "only those employes employed at a rate of wage of less than $50.00 a week or $2500.00 a year will contribute and receive benefits". The state act without limitation imposes the tax on the wages of the individual employe and left the amount of the tax unlimited and imposed upon the entire wage, whether the wage amounts to $1.00 or to $50,000.00; thus, an employe receiving $10,000.00 a year in 1937 will pay 1 per cent, or $100.00 a year, but he cannot receive more than $15.00 a week for a limited number of weeks. As the earnings of the employe go beyond $10,000.00 a year, this disparity increases.

Proposition V.

THE STATE ACT IS IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES BECAUSE IT INTERFERES WITH THE RIGHT OF FREE CONTRACT OF BOTH EMPLOYERS AND EMPLOYEES.

The state act interferes with the right of free contract of both employer and employes. The buying and payment of insurance is clearly a matter of private contract. Under the federal law a citizen who prefers the annuity of a private insurance company is compelled to purchase one from the Federal Government whether he wishes it or not.

An employe under the state act is compelled to buy unemployment compensation insurance although he may have wisely provided out of his wages and out of his property for such a contingency; or although he might be so encumbered with debts or a family as not to be able to pay for the so-called unemployment insurance;

or although his employer may without cost to him have provided a more adequate pension free of bureaucratic administration. The Alabama employe may have more confidence in his own management, or the management of some one selected by him, of his property than in bureaucratic national control.

The Alabama employe who has always been regularly employed in an all-year employment may be bitterly opposed to contributing to a fund which in all probability will support a casual employe of a seasonal occupation; or he may be opposed to having his contract for compensation (the evidence discloses that in some instances there were in existence at the time the 1936 exactions became due unexpired contracts fixing compensation, R. 214) changed by requiring him to accept a sum less than the amount stipulated by the contract. For this and many other reasons the state act constitutes an interference with the freedom of contract.

The right of a citizen to be free from interference of this character by either the State or the Federal Government is well established.

> *Allgeyer v. La.*, 165 U. S. 578;
> *Adair v. United States*, 208 U. S. 161;
> *Coppage v. Kansas*, 236 U. S. 1;
> *Atkins v. Children's Hospital*, 261 U. S. 525;
> *Wolf Packing Co. v. Court of Industrial Relations*, 262 U. S. 522.

It has been generally recognized that voluntary industrial pensions are mere gratuities. In *Lynch v. United States*, 292 U. S. 571, 576-577, the court declared:

> "War Risk Insurance, while resembling in benevolent purpose pensions, compensation allowances, hospital and other privileges accorded to former members of the army and navy or their dependents,

differs from them fundamentally in legal incidents. Pensions, compensation allowances and privileges are gratuities. They involve no agreement of parties; and the grant of them creates no vested right. The benefits conferred by gratuities may be redistributed or withdrawn at any time in the discretion of Congress (Citing authorities). On the other hand War Risk policies, being contracts, are property and create vested rights."

Never before has there been a statute, federal or state, which undertook to impose upon any industry or business, even though affected with a public use, the obligation to pay pensions. Obviously, a pension law either prescribes a naked gratuity, which of course would be invalid, or it provides something in the nature of additional compensation for work done, but payable after and extending beyond the period of employment. This act is most analogous to those which have undertaken to fix wages cited above. *But this statute goes much further for it does not apply until after the employment relationship has been terminated.*

Proposition VI.

WHILE STATES ARE PROPERLY GIVEN WIDE LATITUDE IN THE EXERCISE OF THE POLICE POWER, THIS POWER MUST ALWAYS BE EXERCISED IN SUBORDINATION TO THE PROVISIONS OF THE FEDERAL CONSTITUTION.

Lakeshore & M. S. R. Co. vs. Smith, 173 U. S. 684;
Pennsylvania Coal Co. v. Mahon, 260 U. S. 393.

It has always been held that the police power of the state is limited by the provisions of the federal constitu-

tion. We believe we have demonstrated in this brief, under each of the points discussed, that the state act is in violation of the Fourteenth Amendment to the Constitution of he United States. This being true, the umbrella of the police power of the state is not sufficiently broad to protect the unconstitutionality of the state act.

Proposition VII.

THE AUTHORITIES CITED BY APPELLANTS DO NOT SUSTAIN (a) THE VALIDITY OF THE FEDERAL ACT; (b) THE VALIDITY OF THE STATE ACT.

As stated in the beginning of this brief, it has been prepared in advance of receiving appellants' brief. We have, in discussing the propositions asserted by appellants, referred to many cases which we feel confident will be relied upon by appellants. Should it be necessary, after receiving appellant's brief, to refer to any additional authorities there cited, we will ask the indulgence of the Court to file a reply brief.

Conclusion.

It is respectfully submitted that the decree appealed from should be affirmed.

Respectfully submitted,

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